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August 9, 2018

VIA ELECTRONIC FILING

Hon. Kathleen H. Burgess
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 18-G-0337 – Verified Petition of National Fuel Gas Distribution Corporation for Disposition of Income Tax Savings

Case 17-M-0815 – Proceeding on Motion of the Commission on Changes in Law that May Affect Rates

Dear Secretary Burgess:

Multiple Intervenors hereby submits for filing in the above-referenced proceedings the attached "Comments of Multiple Intervenors in Opposition to Petition." Such Comments respond, primarily in opposition, to the "Verified Petition of National Fuel Gas Distribution Corporation Regarding the Proposed Disposition of Net Federal Income Tax Savings" that was filed on June 4, 2018 and noticed in the June 27, 2018 edition of the *New York State Register* (I.D. No. PSC-26-18-00010-P). Copies of the attached submission are being served herewith on the other active parties to these proceedings.

Respectfully submitted,

COUCH WHITE, LLP

Michael B. Mager

Michael B. Mager

MBM/dap
Attachment
cc: Active Parties (via E-Mail; w/Attachment)
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Verified Petition of National Fuel Gas Distribution Corporation for Disposition of Income Tax Savings	**Case 18-G-0337**
Proceeding on Motion of the Commission on Changes in Law that May Affect Rates	**Case 17-M-0815**

COMMENTS OF MULTIPLE INTERVENORS IN OPPOSITION TO PETITION

Dated: August 9, 2018

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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, including the National Fuel Gas Distribution Corporation ("NFG") service territory, hereby submits these Comments in Opposition to the "Verified Petition of National Fuel Gas Distribution Corporation Regarding the Proposed Disposition of Net Federal Income Tax Savings" ("Petition"), which was filed with the New York State Public Service Commission ("Commission") on June 4, 2018, in Cases 18-G-0337 and 17-M-0815.[1] Notice of the Petition was published in the June 27, 2018 edition of the *New York State Register* (I.D. No. PSC-26-18-00010-P). For the reasons set forth herein, Multiple Intervenors urges the Commission to deny the Petition in large part. In particular, NFG's arguments in support of an inequitable allocation of tax savings and imputation of a higher equity ratio for ratemaking purposes are without merit and should be rejected.

A. Relevant Background

On December 22, 2017, the Tax Cuts and Jobs Act ("Tax Act") was signed into law. The Tax Act, *inter alia*, reduces the corporate federal income tax rate, which is applicable to all or most New York utilities including NFG, from 35% to 21%.[2] In response thereto, the

[1] Case 18-G-0337, *Verified Petition of National Fuel Gas Distribution Corporation for Disposition of Income Tax Savings*, and Case 17-M-0815, *Proceeding on Motion of the Commission on Changes in Law that May Affect Rates*.

[2] *See, e.g.*, Case 17-M-0815, *supra*, Order Instituting Proceeding (issued December 29, 2017) at 1.

Commission instituted Case 17-M-0815, to address the impacts of the Tax Act on utilities and customers, with the goal of preserving any net tax savings for the benefit of customers.[3]

On March 29, 2018, Department of Public Service Staff ("Staff") issued the "Staff Proposal to Address the Accounting and Ratemaking of the Tax Cuts and Jobs Act of 2017" ("Staff Proposal") in Case 17-M-0815. The Staff Proposal advances the following primary recommendation:

> Staff proposes that the net tax benefits resulting from the lower tax expense be preserved for ratepayers in their entirety until they are reflected in rates. As more fully described below, Staff recommends that the utilities continue to defer the net impact of the changes resulting from the Tax Act until such time that the benefits can be fully passed on to customers through a general rate case and/or sur-credit filing addressing the disposition of all impacts of the Tax Act.

(Straw Proposal at 6; footnotes omitted.) Staff recommended further that "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 change, specifically for the implementation of a sur-credit, to be effective October 1, 2018." (*Id.* at 25-26.)

Pursuant to the Commission's Order Instituting Proceeding in Case 17-M-0815, parties were placed on notice that they would have 90 days to comment upon the Staff Proposal.[4] Thereafter, on June 11, the Commission issued a notice soliciting comments on the Staff Proposal in Case 17-M-0815 by June 27, 2018.[5]

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[3] *Id.* at 2-3.

[4] Case 17-M-0815, *supra*, Order Instituting Proceeding at 4.

[5] Case 17-M-0815, *supra*, Notice Soliciting Comments on Staff Proposal (issued June 11, 2018).

On June 4, 2018, NFG filed its Petition in these proceedings. In the Petition, NFG seeks a Commission order authorizing it to: (a) return the net effect of the Tax Act – estimated to be $7.8 million for 2018 and $10.8 million for 2019 – to customers as soon as possible in the form of a sur-credit; (b) impute an increase to its Commission-established equity ratio for ratemaking purposes from 42.9% to 45.01%; and (c) allocate the vast majority of the proposed sur-credit to residential customers, notwithstanding the lack of any cost basis for such proposal. (*See generally* Petition at 6-12.)

B. Summary of Multiple Intervenors' Positions

For the reasons set forth below, Multiple Intervenors urges the Commission to rule as follows in response to the Petition:

- NFG's proposal to implement a sur-credit mechanism to return the benefits of the Tax Act to customers should be granted. Inasmuch as NFG's gas delivery rates are based on the previous, much-higher, corporate federal income tax rate and the utility currently does not have a rate case pending before the Commission, use of a sur-credit mechanism is appropriate in this instance.
- NFG's proposal to impute an increase to its Commission-approved equity ratio for ratemaking purposes should be rejected. The appropriate equity ratio for NFG recently was litigated and decided by the Commission. Neither the Commission's Order Instituting Proceeding nor the Staff Proposal in Case 17-M-0815 indicate any intention to reopen utility equity ratio determinations made in rate proceedings.
- NFG's proposal to allocate the sur-credit in a manner devoid of a cost basis – which also would be extremely inequitable to non-residential customers including

but not limited to Multiple Intervenors members – should be rejected. Instead, NFG should return tax-related savings to customers in a manner consistent with how tax-related expenses are or were recovered from customers. Such an outcome would be equitable and consistent with cost causation principles.

ARGUMENT

POINT I

NFG SHOULD BE DIRECTED TO IMPLEMENT A SUR-CREDIT MECHANISM FOR THE BENEFIT OF CUSTOMERS BY NO LATER THAN OCTOBER 1, 2018

As a result of the Tax Act, NFG estimates savings of approximately $7.8 million in 2018 and $10.8 million in 2019. (Petition at 1.) As set forth, *supra*, an important element of the Tax Act is the reduction of the corporate federal income tax rate from 35% to 21%. NFG asserts that "the rate effect of this component of the Tax Act has been known and measurable since January 1, 2018 and this Petition seeks to return the net effect of that tax rate reduction to the Company's customers as soon as possible." (Petition at 2.) Multiple Intervenors agrees with and supports this aspect of the Petition, notwithstanding its opposition to other proposals contained therein. Multiple Intervenors recommends that the Commission direct NFG to implement a sur-credit mechanism for the benefit of customers – to return the aforementioned savings relating to the Tax Act – by no later than October 1, 2018.

In Case 17-M-0815, Staff recommended that "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 change, specifically for the implementation of a sur-credit, to be effective October

1, 2018."[6] Inasmuch as NFG's existing delivery rates were set based on the superseded 35% corporate federal income tax rate, and the utility does not have a rate proceeding pending at the Commission, a sur-credit mechanism to return Tax Act savings to customers is wholly appropriate. NFG has not identified any issues related to compliance with Staff's proposed sur-credit implementation date of October 1, 2018, and, therefore, consistent with the utility's wishes to return the Tax Act savings to customers "as soon as possible," an October 1st (or earlier) implementation date for the sur-credit should be adopted here. Having such sur-credit in place in advance of, and during, the winter heating season also would be beneficial to customers.

Accordingly, for the reasons set forth above, NFG should be directed to implement a sur-credit mechanism for the benefit of customers by no later than October 1, 2018.

POINT II

NFG'S PROPOSAL TO IMPUTE AN INCREASE TO ITS COMMISSION-APPROVED EQUITY RATIO FOR RATEMAKING PURPOSES SHOULD BE REJECTED

In its Petition, NFG proposes to impute an increase to its Commission-approved equity ratio as a result of the Tax Act. Specifically, NFG seeks to utilize a 45.01% equity ratio in lieu of the 42.9% equity approved by the Commission in the utility's last rate proceeding. (Petition at 7-8.) For the reasons set forth below, NFG's proposal should be rejected.

Initially, implementing an increase to NFG's equity ratio is akin to increasing rates to customers outside of a rate proceeding. In its Order Instituting Proceeding herein, the Commission made clear that benefits or savings stemming from the Tax Act would inure to the

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[6] Case 17-M-0815, *supra*, Staff Proposal at 25-26.

benefit of customers,[7] not utility shareholders. Similarly, in the Staff Proposal, Staff recommended that savings from the Tax Act be preserved for customers "in their entirety." (Staff Proposal at 6.) Increasing NFG's equity ratio for ratemaking purposes from 42.9% to 45.01% – a material increase that ultimately would be borne by customers – seemingly shifts a sizeable portion of the Tax Act benefits from customers to shareholders.

Moreover, although NFG attempts to equate savings from the Tax Act with changes in its parent's equity ratio as similar effects flowing from the Tax Act (*see, e.g.*, Petition at 7-9), there is at least one material difference. NFG's tax liability is a matter of fact, not judgment. Its actual tax expense is reconcilable with its projected tax expense. Thus, the Tax Act's reduction of the corporate federal income rate from 35% to 21% indisputably reduces NFG's tax liability, and the resulting savings would – and should – flow to customers, who ultimately bear the utility's prudently-incurred tax expense. Absent the proposed sur-credit mechanism, which Multiple Intervenors supports in concept, reductions in NFG's tax liability ordinarily would and/or should be deferred, with interest, for future customer benefit. Thus, implementing a sur-credit does at least two things: (1) it starts returning savings stemming from the Tax Act to customers in the near-term, rather than continuing to allow those savings to accumulate as an ever-increasing deferral on NFG's books; and (2) it minimizes the carrying costs, or interest, that NFG would have to pay to customers for the delayed return of those savings, given that utility's corporate federal income tax liability has been based on a 21% rate since the beginning of 2018, while present rates still are reflective of the superseded 35% rate.

In contrast, the appropriate equity ratio to utilize for ratemaking purposes is not a matter of fact, but, instead, a matter of judgment. The Commission considers multiple factors

[7] *See* Case 17-M-0815, *supra*, Order Instituting Proceeding at 2-3.

when setting a utility's equity ratio. Moreover, whenever a particular equity ratio is approved in a rate proceeding, it remains in effect for ratemaking purposes unless and until modified in a subsequent rate proceeding. Multiple Intervenors is not aware of any instance where the Commission modified a utility's equity ratio for ratemaking purposes outside of a rate proceeding. Here, NFG claims, *inter alia*, that as a result of the Tax Act, the equity ratio of its parent increased by 1.91% through March 31, 2018 and more thereafter. (Petition at 7.) Unlike the reduction in NFG's tax liability, however, the impact of legislation on its parent's capital structure is not reconcilable. For instance, if, *arguendo*, the Tax Act or another piece of legislation had the effect of reducing the equity ratios of utilities or their corporate parents, the Commission ordinarily would not impute a lower equity ratio for ratemaking purposes outside of rate proceedings. Similarly, NFG's equity ratio was not reduced retroactively when its parent corporation suffered certain impairments. Rather, the Commission routinely approves equity ratios at certain levels for ratemaking purposes in rate proceedings and, irrespective of changes in conditions, those ratios historically have remained in effect for ratemaking purposes until rates are next reset.

Finally, Multiple Intervenors notes that the issue of NFG's equity ratio was the subject of extensive, recent litigation, and was decided just last year in the utility's most recent rate proceeding. In its order therein, the Commission relied upon numerous factors (*e.g.*, the capital structure of NFG's parent, impairment losses, the presiding Administrative Law Judge's recommendations, the Commission's longstanding precedent in this area) in adopting a 42.9%

equity ratio.[8] There is no indication that the Commission intended that equity ratio to be modified in advance of the utility's next rate proceeding.

For the foregoing reasons, NFG's proposal to impute an increase to its Commission-approved equity ratio for ratemaking purposes should be rejected.

POINT III

NFG'S PROPOSAL TO ALLOCATE THE VAST MAJORITY OF THE SUR-CREDIT TO RESIDENTIAL CUSTOMERS SHOULD BE REJECTED

In its Petition, NFG proposes to allocate the vast majority (*i.e.*, 83.49%) of Tax Act savings to residential customers. (Petition at 10-12.) For the reasons set forth below, such proposal is unjust, unreasonable, grossly inequitable to non-residential customers, and inconsistent with cost-of-service principles and evidence. Accordingly, the proposal should be rejected. Instead, the Commission should adhere to cost-of-service principles and direct that Tax Act savings be returned to customers in a manner consistent with how the underlying tax liability is recovered from customers. In other words, if, hypothetically, residential customers and non-residential customers are responsible for 60% and 40% of NFG's corporate federal income tax liability, respectively, then reductions in that liability should be returned to residential customers and non-residential customers on a 60/40 basis. In contrast to NFG's proposal, such an approach would be just and reasonable, equitable to all customer classes, and consistent with cost-of-service principles.

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[8] Case 16-G-0257, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of National Fuel Gas Distribution Corp. for Gas Service*, Order Establishing Rates for Gas Service (issued April 20, 2017) at 49-52.

NFG argues that it is using the revenue requirement increase allocation percentages from its last rate proceeding to allocate the Tax Act savings. (Petition at 10.) Such argument lacks merit. The allocation of revenue requirement from NFG's last rate proceeding is not the same as the allocation of the utility's tax liability, nor is it relevant here. The amounts available to be credited back to customers relate solely to the fact that NFG's current rates are over-collecting for tax liability, primarily (if not exclusively) because such rates are based on a 35% corporate federal income tax rate, while the rate in effect was reduced to 21% at the beginning of 2018. Thus, NFG is over-collecting for its corporate federal income tax expense, and, therefore, should return such over-collections to the customers in the proportion that each service class contributed thereto. Class responsibility for the overall revenue requirement increase in NFG's last rate proceeding simply has no relevance to the specific savings, or over-collections, at issue here.

NFG also argues that its proposal to allocate the vast majority of Tax Act savings to residential customers is appropriate because: (a) "commercial and industrial customers largely will enjoy the benefit of the dramatic reduction of the corporate income tax rate, while residential customers will continue to pay income taxes based on, in many cases, higher, personal tax rates"; and (b) "many New York residential customers now are faced with limitations on state and local income tax deductions when filing their federal income tax returns; thus the benefits of the Tax Act have been unfortunately muted for these people." (Petition at 10.) For numerous reasons, NFG's arguments, again, are without merit.

First, NFG's attempt to compare the equity or the appropriateness of corporate federal income tax rates and personal federal income tax rates is highly selective and woefully incomplete. The fact that the corporate federal income tax rate was reduced does not mean that there is inequitable treatment of individuals vis-à-vis corporations. Indeed, personal federal income tax rates also were reduced for 2018, and standard deductions were increased.[9] NFG's argument is factually deficient and, in any event, is irrelevant.

Second, NFG's reliance on limitations on state and local tax deductions for federal income tax purposes also is misplaced. Again, the argument is highly-selective; NFG omits, for instance, the tax rate reductions enacted for individuals as well as increases to the standard deductions applicable thereto.[10] Thus, NFG has failed to demonstrate that the Tax Act somehow disproportionately benefits corporations at the expense of individuals.

Third, even if, *arguendo*, one were to conclude that the Tax Act is more advantageous to corporations than individuals, such conclusion is irrelevant here. The issue before the Commission relates solely to how over-collections of NFG's corporate federal income tax embedded into existing rates should be returned to customers. Clearly, the most equitable resolution of the issue would be to return such over-collections to customers based on how they were recovered from customers in the first place.

Fourth, with all due respect to the Commission, it possesses neither the expertise, nor the legal authority, to evaluate the relative merits of federal income tax legislation and/or redress purported inequities associated therewith. The Commission should resist any temptation to set gas delivery rates based on alleged federal income tax inequities.

Finally, and perhaps most importantly, allocating the vast majority of Tax Act savings to residential customers not only is inequitable to non-residential customers and inconsistent with cost-of-service principles in that such proposed allocation is at odds with how

[9] *See, e.g., Here's how your tax bracket will change in 2018*, Business Insider (dated February 14, 2018), available at: https://www.businessinsider.com/tax-brackets-2018-trump-tax-plan-chart-2017-12.

[10] *See, e.g., id.*

the funds in question were recovered, it also is inconsistent with the best-available cost-of-service evidence. In NFG's last rate proceeding, the utility's own cost study demonstrated that non-residential customers have been subsidizing residential customers. For instance, NFG's cost study depicted the following variations in class rates of return:

Service Class	**Rate of Return**	**Indexed Rate of Return**
SC 1	5.69%	0.729487
SC 3	16.32%	2.092308
SC 13, TC 1.1	24.65%	3.160256
SC 13, TC 2.0	17.04%	2.184615
SC 13, TC 3.0	19.37%	2.483333
SC 13, TC 4.0	17.29%	2.216667
SC 13, TC 4.1	11.25%	1.442308
Cogen	-25.36%	-3.251282
Total System	7.80%	1.000000

(Case 16-G-0257, Ex. 201, Sch. 2 at 14, *see* Rows 689 and 691.) Thus, according to NFG, while residential customers served under S.C. 1 were producing a rate of return (5.69%) below the system average (7.80%), non-residential customers served under S.C. 3 and S.C. 13 were producing returns well above the system average and, in many cases, more than double or even triple the system average.

In its recent decision resolving NFG's last rate proceeding, the Commission agreed with Multiple Intervenors that NFG's "cost of service study demonstrates that the rate of return disparities are significant, and it is consistent with sound ratemaking principles to correct them here."[11] The correction, however, was relatively modest – based on a system-wide approved rate increase of 2.18%, residential customers were allocated a 2.42% increase while non-residential customers were allocated a 1.45% increase.[12]

[11] Case 16-G-0257, *supra*, Order Establishing Rates for Gas Service (issued April 20, 2017) at 92.

[12] *Id.* at Appendix 3.

Multiple Intervenors is not attempting to advocate, based on cost-of-service study results showing the aforementioned discrepancies in class rates of return, that non-residential customers should be allocated a disproportionate share of Tax Act savings. Rather, as detailed, *supra*, Multiple Intervenors seeks merely an equitable, cost-based allocation methodology, whereby tax-related over-collections are returned to service classifications based on how the underlying tax liability was allocated to and recovered from customers. Significantly, however, if, *arguendo*, the Commission is inclined to evaluate considerations other than how the underlying tax over-collection was collected from customers, than the fact that non-residential customers have been subsidizing residential customers should not be ignored. Indeed, having taken action in NFG's last rate proceeding to begin to address "significant" inequities in class rates of return, NFG's proposal to allocate the vast majority of Tax Act savings to residential customers – irrespective of how the underlying over-collections were recovered – makes no sense and would defeat the purpose of the revenue allocation adopted recently by the Commission following extensive litigation.

For the foregoing reasons, NFG's proposal to allocate the vast majority of the sur-credit to residential customers is wholly without merit and should be rejected.

CONCLUSION

For all the foregoing reasons, the Commission should reject NFG's Petition in large part and rule in a manner consistent with Multiple Intervenors' positions, as set forth herein. Specifically, the Commission should issue an order: (a) directing NFG to implement a sur-credit mechanism for the benefit of customers relating to Tax Act savings by no later than October 1, 2018; (b) rejecting NFG's proposal to impute an increase to its Commission-approved equity ratio for ratemaking purposes; and (c) rejecting NFG's proposal to allocate the vast majority of the sur-credit, representing Tax Act savings, to residential customers notwithstanding the absence of any cost justification for so doing. Instead, Tax Act savings should be allocated to and amongst NFG's service classes in a manner consistent with how tax-related expenses are recovered from customers. Such an outcome would be equitable and consistent with cost-of-service principles.

Dated: August 9, 2018
Albany, New York

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