Democrat-Controlled PA PUC Touts Trump Tax Savings to Ratepayers, Denies Infrastructure Reinvestment

In a choice between infrastructure reinvestment and a direct pass-through of the tax savings to ratepayers, the Democrat-controlled Pennsylvania Public Utility Commission (PA PUC) has chosen a direct pass-through and claimed credit for ordering 17 Pennsylvania utilities to return more than $320 million to ratepayers.[1] By an order entered on May 17, 2018, the PA PUC adjudicated how President Trump's signature Tax Cuts and Jobs Act of 2017 (TCJA) and the lowering of the corporate federal income tax rate from 35 percent to 21 percent should affect utility rates.[2] The order directs major electric, natural gas, and water/wastewater utilities to include negative surcharges on customer bills beginning on July 1, 2018, to provide the TCJA benefits directly to ratepayers. Utilities with pending and upcoming base rate cases were directed to address the tax savings in those cases.

The PA PUC consists of Democrats Gladys Brown (chairman), Andrew Place (vice chairman), and David Sweet, and Republicans John Coleman and Norman Kennard, all of whom were nominated by Democrat Governor Tom Wolf and confirmed by the Pennsylvania Senate. Wolf is facing a tough re-election challenge from Trump-like Republican State Senator Scott Wagner in the fall who, if elected, would likely significantly revamp the composition of the PA PUC during his term. PA PUC commissioners serve five-year terms with one being up for re-nomination each year. The governor selects the chairman and the commissioners elect a vice chairman.

The PA PUC's TCJA order was adopted by a 5-0 vote, with Place and Sweet concurring in part and dissenting in part. Place and Sweet contend that, rather than have the utilities pay the residential mortgage lending rate in refunding the monies already collected as a result of the tax reduction, the utilities should be forced to pay interest at a much-higher rate equal to each utility's overall cost of capital and rate of return — on a theory that the tax savings were akin to a loan from ratepayers and ratepayers should, therefore, benefit from the utilities' earnings.

In approving the pass-through, the PA PUC rejected arguments by various commenters that some portion of the tax savings should be used by the utilities to reinvest in infrastructure — which would improve the quality of service for consumers and create jobs. Likewise, arguments that the refunds and direct pass-throughs violate longstanding utility ratemaking prohibitions against retroactive and single-issue ratemaking were summarily rejected with little legal analysis. The prohibitions recognize that, while certain utility expenses (such as tax expense) may have gone down, other expenses may have gone up. As such, utility rates should be set prospectively and look at all expenses at the same time.

The order does not address situations in which the utility may have agreed to a rate case stay-out as part of a prior rate case settlement and whether the PA PUC will entertain requests to lift such stay-outs in light of the tax savings pass-through and the constitutional right of utilities to earn a fair rate of return. The order also fails to explain in any meaningful manner why refunds were ordered from the effective date of the tax reduction (January 1, 2018) instead of the date on which the PA PUC declared the utilities' commission-approved rates to be "temporary rates" that are subject to refund (March 15, 2018). It remains to be seen whether any utility will challenge the PA PUC's actions.

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[1] *See* PA PUC Press Release, dated May 17, 2018, titled *PUC Orders 17 Utilities to Return $320+ Million to Consumers Following Analysis of Federal Tax Reform; Other Tax Reform Impacts Considered as Part of Ongoing Utility Rate Cases*.

[2] A copy of the PA PUC's order can be found on the PA PUC's website at Docket No. M-2018-2641242.