

STATE OF ALASKA**BEFORE THE REGULATORY COMMISSION OF ALASKA**

Before Commissioners:

Stephen A. McAlpine, Chairman
Paul F. Lisanke
Robert M. Pickett
Antony G. Scott
Janis W. WilsonIn re Consideration of the Impact of the
Tax Cut and Jobs Act of 2017 on
Alaskan Pubic Utilities

Docket No. I-18-002

PETITION FOR RECONSIDERATION AND REQUEST FOR STAY

Alaska Power Company (“APC”) hereby petitions the Regulatory Commission of Alaska (“Commission”) to reconsider its May 4, 2018 Letter Order (“Letter Order”).¹ The Letter Order requires APC to “capture the estimated reduction in federal income tax caused by enactment of the Tax Act in a deferral account.”² In light of the legal vulnerability of the Letter Order, APC respectfully requests the Commission reconsider and stay the Letter Order so APC can conduct an expedited rate case to address the underlying concerns of the Commission.

Background

The Tax Cuts and Jobs Act (“2017 Tax Act”) was signed into law on December 22, 2017.³ As a result of the new law, the Federal corporate income tax rate dropped to a flat rate of twenty-one percent. The Attorney General, Regulatory Affairs & Public Advocacy Section (“RAPA”) asked the Commission to open a docket to investigate how the tax cut would

¹ See *In re Consideration of the Impact of the Tax cut and Jobs Act of 2017 on Alaskan Pubic Utilities*, Docket No. I-18-002 (May 3, 2018) (“Letter Order”); See 3 AAC 48.105.

² Letter Order at 1.

³ Pub. L. No. 115-97, § 13001(a), 131 Stat. 2054 (Dec. 22, 2017).

impact regulated utilities.⁴ RAPA advocated that “ratepayers should receive the benefit of any over-collections.”⁵

The Commission discussed the RAPA Petition and voted to open an investigation at the March 14, 2018 Public Meeting. The Commission considered asking “the largest utilities” to estimate the impact of the tax cuts on “operations and savings.”⁶ The Commission sent a letter to each utility before deciding how to proceed. “So the letter will give the utility the opportunity to respond and say what it is they’re going to do or not do. And then as Commissioner Lisanke indicated, the Commission can make a determination whether a more formalized investigation is warranted at that point.”⁷ The Letter Order requires a deferral, but the Commission has not opened a utility or rulemaking docket to formally decide how to proceed.

APC is a small electric utility that takes its obligations to its customers very seriously. APC last underwent a rate case in 2016 (using a 2015 test year). Public policy does not support the integration of a lower tax rate without a more holistic review of APC’s revenue requirement to determine the best way to incorporate the tax savings proscribed by the 2017 Tax Act. As APC indicated in its response to the Commission, it stands willing to initiate an expedited rate case to determine the exact impact of the 2017 Tax Act on APC’s rates.⁸ The

⁴ See *In re Consideration of the Impact of the Tax cut and Jobs Act of 2017 on Alaskan Public Utilities*, Docket No. I-18-002, RAPA Petition (Feb. 12, 2018) (“RAPA Petition”).

⁵ RAPA Petition at 2.

⁶ March 14, 2018 Public Meeting Transcript at 71.

⁷ March 14, 2018 Public Meeting Transcript at 76.

⁸ See *In re Consideration of the Impact of the Tax cut and Jobs Act of 2017 on Alaskan Public Utilities*, Docket No. I-18-002, APC Letter to RCA (May 3, 2018).

deferral required by the Letter Order does not provide an adequate opportunity to assess the actual impact on rates.

APC did not object to the Commission's decision to open this Information Docket and APC actively participated by producing the information requested by the Commission. APC encouraged the Commission to allow it to follow the plan articulated in its letters submitted on April 5 and May 3 to proceed with a simplified rate-making docket with the following characteristics:

1. The rate case review would take no longer than six months from the date of filing to the final decision.
2. APC would file a revenue requirement calculation using 2017 as a test year.
3. The revenue requirement calculation would incorporate the new tax rate, including a revised ADIT amount.
4. APC and the RCA would agree to use the most recent, stipulated capital structure including the stipulated cost of debt and cost of equity. This would be key to minimizing review time of the proceeding and the costs to APC, the RCA, and RAPA.
5. Any rate change (up or down) resulting from the rate case review would be implemented no later than 30 days from the date of the final order.⁹

Each utility affected by the 2017 Tax Act is at a different place in their rate-making cycle, yet the Commission's standardized approach to create deferral accounts to capture the benefit of the 2017 Tax Act fails to take APC's request into account or consider the comments of other utilities regarding the most appropriate path forward for each of them. APC therefore urges the Commission to reconsider its Letter Order and stay its deferral requirement to allow APC to proceed with an expedited rate case as described above.

Argument

The Commission's requirement to implement deferral accounting for an undefined time pending further action by the Commission action suffers from legal vulnerabilities that

⁹ *Id.* at 1-2.

call this requirement into question. The Commission's deferral accounting requirement creates a liability that the Commission intends be refunded to customers. Since the Commission's process is fundamentally flawed, it should be reconsidered.

I. The Letter Order Violates Alaska Law and Public Policy.

The Commission's proposed deferral accounting process and the Letter Order to APC violates Alaska law and public policy considerations. APC believes that there is a more legally defensible path forward that returns funds to customers in a more responsible manner. At a minimum, the Commission should establish an alternate path for utilities willing to commence a rate case within 6 months. According to Alaska law, a rate case is the best and most appropriate way to establish new rates.¹⁰

A. A Formal Investigation Is Required.

The Commission's use of an Information Docket was initially appropriate to determine whether or not to open a Regulations Docket and investigate the information needed to make a reasoned decision on a company-by-company basis regarding the flow through of the 2017 Tax Act. But the Information Docket was not an appropriate mechanism to make specific findings and order a deferral on an ongoing, indefinite basis.¹¹ The Commission's preliminary request for information did not ask for specific calculations; rather, the request solicited information for a standard path forward. There were no evidentiary hearings and limited oral comment was solicited by the Commission at the Public Meetings in which the matter was discussed. Normally, the omission of these due process procedure safeguards would not be problematic except that the Commission issued identical Letter

¹⁰ *MEA v. Chugach Elec. Ass'n, Inc.*, 53 P.3d 578, 583 (Alaska 2002).

¹¹ Letter Order at 1.

Orders to each affected utility requiring the establishment of a deferral account.¹² The process and ultimate action are incompatible and should be reconsidered.

As the Commission noted at the March 14 Public Meeting, other state commissions who have addressed the application of the 2017 Tax Act launched formal investigation dockets.¹³ The distinction between the Commission's Letter Order arising out of an Information docket and other state commissions' formal evaluation of the 2017 Tax Act is striking. APC believes Alaska law and public policy requires a more formal approach to the evaluation of tax savings before any action can be required. The specific circumstances of each carrier must be investigated, evaluated and appropriate rates developed. A one size fits all approach is wholly inappropriate and indefensible.¹⁴

In 1986, a similar tax reform bill was passed by Congress.¹⁵ The Commission opened a Regulations Docket to investigate whether the legislation would impact utility rates and how to flow the benefit through to customers.¹⁶ The Docket took a year to work through on an industry-wide basis.¹⁷ It is important to note that the Commission used the 1987 test year to thoroughly and accurately evaluate the best method to return the tax benefit to consumers.¹⁸ In

¹² Letter Order at 1.

¹³ March 14, 2018 Public Meeting Transcript at 67.

¹⁴ Every affected utility company received the same Letter Order. This approach would be difficult to sustain on appeal.

¹⁵ Tax Reform Act of 1986 (TRA) (Pub.L. 99-514, 100 Stat. 2085, enacted October 22, 1986).

¹⁶ *See In re the Consideration of the Impact of the Tax Reform Act of 1986 on Alaskan Public Utilities*, Docket No. R-87-002 .

¹⁷ Given the trend over the last 20 years of strengthening regulatory due process law regarding ratemaking in Alaska, it is unlikely that this procedure would satisfy judicial scrutiny.

¹⁸ *See In re the Consideration of the Impact of the Tax Reform Act of 1986 on Alaskan Public Utilities*, Docket No. R-87-002(General Order 15) at 1. In the 1980s, there was plenty of advance notice that tax rates were changing, so all ratemaking was prospective.

some cases, the Commission agreed to defer the determination for a year and allow companies to file a rate case based on the 1987 test year.¹⁹ APC respectfully suggests that this procedure is the appropriate procedural mechanism to investigate and determine the appropriate amount of tax benefit to reflect in consumer rates.

B. The Commission Letter Order Constitutes Retroactive Ratemaking.

Alaska law prohibits retroactive ratemaking.²⁰ “A fundamental rule of ratemaking is that rates are exclusively prospective in nature. One purpose of having such a rule is a consumer’s right to rely on rates set by [the RCA]. Some reliability, of course, is essential, to the public utility regulatory system.”²¹ The regulatory compact between the regulator and the regulated brings a balance of interests to the Commission, the utility and consumers.

Unknown and unpredictable swings in rates should be avoided.²²

The Commission premises its current action on a need to correct rates for the financial windfall created by the 2017 Tax Act.²³ “The essential principle of the rule against retroactive ratemaking is that when the estimates prove inaccurate and the costs are higher or lower than predicted, the previously set rates cannot be changed to correct for the error; the only step that [the RCA] can take is to prospectively revise rates in an effort to set more appropriate ones.”²⁴ The current situation is analogous and triggers the same restrictions on Commission action. Although APC’s current rates were not developed with this tax cut in

¹⁹ *Id.* at 1-2.

²⁰ *See AECA v. Reg. Comm’n of Alaska*, 262 P.3d 204, 210 (Alaska 2011).

²¹ *Id.* (quoting *MEA v. Chugach Elec. Ass’n, Inc.*, 53 P.3d 578, 583 (Alaska 2002)).

²² *MEA*, 53 P.3d at 580 (“Retroactive ratemaking by a utility is prohibited in Alaska, as it is in the majority of jurisdictions in the United States.”).

²³ April 11, 2018 Public Meeting Transcript at 123-28.

²⁴ *AECA*, 262 P.3d at 210 (quoting *MEA*, 53 P.3d at 585-86).

mind, the Commission cannot reach backward to capture the benefit on a retroactive basis. It is critical to note that the current rates were developed with a 2015 test year and it would also be inappropriate to return the entire tax benefit without the more holistic review proposed by APC in its comments.

The Commission noted at the March 14 Public Meeting that it would require utilities to make deferral entries back to January 1, 2018, to “track the implications on their books.”²⁵ The Commission notes that the deferral “maintains the Commission’s capability of taking those changes into effect.”²⁶ This stark admission that the Commission intends to use the accounting device in future ratemaking is a fatal flaw. The deferral mechanism was intended to avoid “any problems with retroactive ratemaking, which our state is probably one of the strictest standards against retroactive ratemaking if the Supreme Court cases of the last 20 years are still good law.”²⁷ Those cases are still good law and the implementation of retroactive ratemaking remains strictly prohibited.²⁸ As discussed herein, the requirement of deferral accounting with the intent of refunding the deferred savings to customers falls squarely within the definition of retroactive ratemaking.

The treatment of the 1986 Tax Reform Act in Iowa is instructive to the Commission’s consideration of the 2017 Tax Act. The Iowa legislature passed a statute detailing how the effects of the 1986 Tax Reform Act were to be incorporated into utility rates.²⁹ One utility filed a rate case, with new rates taking effect December 28, 1987. The Iowa Utilities Board

²⁵ March 14, 2018 Public Meeting Transcript at 72.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See Far North Sanitation, Inc. v. APUC*, 825 P.3d 867 (Alaska 1992); *MEA*, 53 P.3d at 583); and *AECA*, 262 P.3d at 210.

²⁹ Iowa Code § 476.8A (1989).

approved those rates, but also ordered the utility to refund amounts to customers covering the period July 1, 1987 (when the new tax rates took effect) to December 28, 1987. The Iowa Supreme Court overturned the refund order, concluding that the order violated the filed rate doctrine, primarily because the Iowa Utilities Board had initiated the change in the existing rate, not the utility.³⁰ The Commission's requirement to book potential tax savings as a deferral creates a liability the Commission intends to refund to consumers retroactive to January 1, 2018. APC respectfully suggests that the current action required by the Commission will reach a similar outcome. Since alternative paths exist to effectuate the Commission's intent, APC requests the Commission grant this Petition and stay the proceeding for six months to allow APC to commence an expedited rate case.

C. The Deferral Account Essentially Establishes An Interim Rate Subject to Customer Refund.

The Letter Order requires APC to establish a deferral account going back to January 1, 2018.³¹ The stated purpose of the deferral is to accumulate the tax benefit to refund to utility customers.³² The Commission does not have the legal authority to establish an interim and refundable rate except at the express request of the utility.³³ This same issue arose in the late 1980s following the 1986 Tax Act. The RCA's predecessor, APUC, required utilities to establish the new, agreed upon lower rate retroactively to the date of the tax cut, but the Alaska Supreme Court held that action constituted an "interim rate" and was impermissible

³⁰ *GTE North Inc. v. Iowa State Utilities Bd., Div. of Dept. of Commerce, State of Iowa*, 473 N.W.2d 48, 51-52 (Iowa 1991).

³¹ Letter Order at 1.

³² See generally March 14, 2018 Public Meeting Transcript.

³³ See *Far North Sanitation, Inc.*, 825 P.3d at 867.

under Alaska law.³⁴ “Here, the APUC adopted an ‘interim rate’ without first holding a hearing. Granted, the interim rate was the same as the previous rate. Nevertheless, the rate was subject to refund.”³⁵ In Alaska, a refundable rate is due sufficient notice and process. Neither has occurred in the existing Information Docket.

II. The Commission Should Reconsider the Letter Order and Stay the Requirements Therein.

APC stands ready and willing to undergo an expedited rate case as described in its comments before the Commission.³⁶ As the Commission noted at the March 14 Public Meeting, the issue is not a straight forward matter of an “absolute tax rate. There were other changes made in the tax law. Depending on what the circumstances are, the utility with CapEx, executive compensation package structure – just a whole bunch of things.”³⁷ APC respectfully asserts that it makes little sense for the Commission to focus on one rate element to evaluate a change to the overall consumer rate. Alaska law and public policy strongly favor a broader view of the entire picture to make sure that both the utility and the consumer are made whole. The interim step of requiring APC to undertake a liability in the form of a deferral account makes little sense when APC is willing to undergo an expedited rate case to make the correct determination.

APC supports the Petitions being filed by other utilities. Each company has its own unique circumstances and the remedy differs a bit for each. Consistent in the industry is a desire to fulfill the core concern of the Commission: to treat Alaska rate payers fairly and

³⁴ *Id.* at 872.

³⁵ *Id.*

³⁶ *See In re Consideration of the Impact of the Tax cut and Jobs Act of 2017 on Alaskan Public Utilities*, Docket No. I-18-002, APC Letter to RCA (April 5, 2018 and May 3, 2018).

³⁷ March 14, 2018 Public Meeting Transcript at 75.

share the benefit of the 2017 Tax Act. Approaching that goal with care and regulatory deliberation should govern the Commission's action.

Conclusion

APC respects the Commission's desire to ensure that any benefit generated by the 2017 Tax Act gets appropriately passed to its customers, yet how the Commission achieves this goal matters a great deal. APC does not agree that the Commission's current path represents a legal mechanism to reach its goal, nor is it the most rational path. APC remains willing to engage in an expedited rate case based on a 2017 test year to most efficiently and accurately translate the savings achieved by APC to its customers.

Dated this 17th day of May, 2018.

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