

The Commonwealth Court of Pennsylvania Affirms That Utilities Can Recover Storm Damage Expenses Through an Automatic Adjustment Clause Outside of a Base Rate Case Proceeding

December 22, 2015

By: David B. MacGregor, Principal & Co-Chair
Christopher T. Wright, Principal
Energy & Utilities Practice Group, Post & Schell, P.C.

On December 18, 2015, the Commonwealth Court of Pennsylvania, in a split decision, affirmed a Pennsylvania Public Utility Commission (Pa. PUC) decision that storm damage expenses may be recovered through an automatic, reconcilable adjustment rider under Section 1307(a) of the Public Utility Code, 66 Pa.C.S. § 1307(a). *Tanya J. McCloskey, Acting Consumer Advocate v. Pennsylvania Public Utility Commission*, Docket No. 1023 C.D. 2015, ___ A.3d ___ (December 18, 2015) (“Opinion”). In reaching its decision, the Court confirmed that: (1) Section 1307(a) of the Public Utility Code contains no limit on the types of expenses that may be recovered through the use of an automatic adjustment surcharge, and (2) damages incurred to public utility facilities as a result of extreme weather events are beyond the public utilities’ ability to control and are the type of expense that may be recovered through a Section 1307(a) surcharge.¹

On April 3, 2014, the Pa. PUC approved, with modifications, a proposal by PPL Electric Utilities Corporation (“PPL”) to implement a Storm Damage Expense Rider (“SDER”).² The SDER is designed to

recover from customers or refund to customers applicable storm damage expenses to the extent that these expenses are greater than or less than the level of storm damage costs reflected in base rates. The SDER applies only to costs incurred due to Pa. PUC reportable storms and recovers only operating expenses, i.e., no capital costs are recovered through the SDER.³

The Pennsylvania Office of Consumer Advocate (“OCA”) filed a Petition for Review with the Commonwealth Court, challenging the Pa. PUC’s approval of a Section 1307(a) cost recovery mechanism for the recovery of storm damage expenses.⁴ The OCA argued, among other things, that Section 1307(a) recovery mechanisms are limited to non-capital expenses that are beyond a utility’s control, and the Pa. PUC erred in finding that storm damage expenses to be recovered through the SDER were beyond PPL’s control. The OCA also argued that the SDER constituted impermissible single-issue ratemaking and, therefore, storm damage expenses should only be recovered in base rates.

The majority⁵ for the Commonwealth Court found that the plain language of Section 1307(a) “in no way prohibits the recovery of storm damage expenses or any other expenses through the use of a surcharge.”

continued >>

Footnotes:

¹ PPL Electric Utilities Corporation intervened before the Commonwealth Court and was represented by Post & Schell, P.C.

² *Pa. PUC v. PPL Electric Utilities Corporation*, Docket No. R-2012-2290597 (April 3, 2014).

³ Under the PUC-approved SDER, expenses from major storm events are recovered over three years, with interest. The purpose of this extended recovery period is to improve the stability of rates under the SDER.

⁴ The PP&L Industrial Customer Alliance intervened in support of the OCA’s position before the Commonwealth Court.

⁵ The unpublished Opinion was a four to three split *en banc* Opinion authored by Judge McGinley

(continued from page 1)

Opinion, p. 19. The Commonwealth Court reaffirmed long-standing case law that Section 1307(a) surcharge recovery mechanisms are available (1) where expressly authorized by the General Assembly, or (2) where an expense is easily identifiable and beyond the utility's control. See *id.*, pp. 19-21. Finally, the Commonwealth Court reaffirmed that the doctrine of single-issue ratemaking is inapplicable to Section 1307(a) surcharges, because the surcharges are expressly permitted under the Public Utility Code. See *id.*, p. 22.⁶

The Commonwealth Court also found that the evidence of record supported the finding that the "scale and scope of PPL's storm damage expense addressed by the SDER were well beyond its control." See *id.*, pp. 21, 24. The Commonwealth Court also found that the conditions on the SDER adopted by the Pa. PUC⁷ ensured rapid recovery of a specific identifiable expense. See *id.*, pp. 21-22. For these reasons, the Commonwealth Court concluded that the Pa. PUC did not err or abuse its discretion when it determined that the Section 1307(a) automatic adjustment clause was proper for PPL to recover storm damage expenses, and that the Pa. PUC's approval of the SDER was supported by substantial evidence. See *id.*, p. 22, 25.⁸

Through its decision, the Commonwealth Court reaffirms that Section 1307(a) contains no express limitation on the type of expenses that may be recovered through the use of a surcharge. The Commonwealth Court, however, recognized that case law has limited the availability of surcharges under Section 1307(a) to the following: (i) to recover expenses expressly authorized by the General Assembly, or (ii) to recover non-capital expenses that are easily identifiable and beyond a utility's control. Importantly, the Commonwealth Court has made it clear that storm damage expenses are beyond public utilities' ability to control and are the type of expense that may be recovered through the use of a Section 1307(a) surcharge.

This article was prepared by Principals David B. MacGregor and Christopher T. Wright in Post & Schell's Energy & Utilities Practice Group. If you have any questions or wish to discuss the subject of this article, please contact Mr. Wright at 717.612.6013 or cwright@postschell.com.

Disclaimer: this E-Flash does not offer specific legal advice, nor does it create an attorney-client relationship. You should not reach any legal conclusions based on the information contained in this E-Flash without first seeking the advice of counsel.

Footnotes:

⁶ The majority for the Commonwealth Court found that the SDER did not constitute impermissible single-issue ratemaking. See *id.*, p. 22. In a Dissenting Opinion joined by President Judge Pellegrini and Judge Cohn Jubelirer, Judge McCullough opined that the SDER violated the rule against retroactive ratemaking because it permitted PPL to recover excess expenses or refund excess revenue when compared to base rates.

⁷ The Pa. PUC examined the proposed SDER and conditioned final approval for PPL's discretionary Section 1307 surcharge upon satisfaction of the following burden: (1) the surcharge recovers a legitimate rate component; (2) the expense in question is capable of degrading utility return on rate base to a significant degree; (3) the expense is capable of evading recovery in a prospective Section 1308 base rate proceeding; (4) the surcharge will not recover capital costs, i.e., it is a pure expense; (5) the expense is discrete and easily identified; (6) the expense is variable and beyond the utility's control; (7) the annual reconciliation procedure is adequate; and (8) the surcharge will reset to \$0 at each base rate proceeding or use other mechanisms to prevent double recovery. See *Pa. PUC v. PPL Electric Utilities Corporation*, Docket No. R-2012-2290597, pp. 19-20 (April 3, 2014).

⁸ The OCA also argued that the Pa. PUC erred in providing the parties with only a "paper hearing" process when there were material facts in dispute. The majority for the Commonwealth Court rejected OCA's due process argument, finding that OCA's 'disputed material facts' were premature because any factual issues regarding the amount of storm damage expenses that PPL incurred from storms and whether the expenses were just and reasonable do not arise unless and until PPL Electric submits a claim seeking to recover these costs and expenses through the SDER. See *Opinion*, p. 27.

About the Authors:



David B. MacGregor is a Principal and Co-Chair of Post & Schell, P.C.'s Energy & Utilities Practice Group. His practice focuses on regulation, litigation, and corporate transactions involving the energy industry. Mr. MacGregor has litigated a wide-range of proceedings for electric, gas, water and oil pipeline companies before the Federal Energy Regulatory Commission (FERC), state public utility commissions, and related federal and state court proceedings.

P: 215.587.1197

E: dmacgregor@postschell.com



Christopher T. Wright is a Principal in Post & Schell, P.C.'s Energy & Utilities Practice Group. He represents natural gas, electric, and water utility clients in state regulatory proceedings. Mr. Wright also has experience in related appellate court proceedings, including judicial review of regulatory agency decisions.

P: 717.612.6013

E: cwright@postschell.com