

**BEFORE THE NEW YORK STATE  
PUBLIC SERVICE COMMISSION**

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Proceeding on Motion of the Commission )  
as to the Rates, Charges, Rules and Regulations ) **Case 18-E-0067**  
of Orange and Rockland Utilities, Inc. )  
for Electric Service )  
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Proceeding on Motion of the Commission )  
as to the Rates, Charges, Rules and Regulations ) **Case 18-G-0068**  
of Orange and Rockland Utilities, Inc. )  
for Gas Service )  
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**MOTION OF PACE ENERGY AND CLIMATE CENTER FOR LEAVE TO FILE  
SUPPLEMENTAL DIRECT TESTIMONY OF KARL R. RÁBAGO**

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Pursuant to 16 N.Y.C.R.R. § 3.6, Pace Energy and Climate Center (“Pace”) hereby respectfully requests permission to file the Supplemental Direct Testimony of Karl R. Rábago, which is appended as Exhibit A to this motion. For the reasons set forth below, Pace has good cause for seeking to file supplemental direct testimony at this stage in the proceeding, inclusion of the supplemental testimony in the record of this proceeding will aid the Commission in its investigation, and accepting the supplemental testimony for filing at this juncture would not prejudice other parties.

## **ARGUMENT**

### **I. PACE HAS GOOD CAUSE FOR SEEKING TO FILE SUPPLEMENTAL TESTIMONY AFTER JUNE 15, 2018**

Pursuant to the Ruling Modifying Procedural Schedule issued on May 9, 2018, all intervenor testimony was to be filed on May 25, 2018, and rebuttal testimony was to be submitted on June 15, 2018. Pace timely filed the direct and rebuttal testimonies of Mr. Rábago. On May 8, 2018, Pace issued its fifth set of Information Requests to Orange & Rockland Utilities, Inc. (“the Company”) concerning trade associate dues. In its response to this set of Information Requests, made available by the Company on May 18, the Company objected to six requests, *see* Responses to Pace Set 5, Questions 24-29; claimed that it was “unable to respond” to two requests, *see* Responses to Pace Set 5, Questions 10-11; and provided responses that Pace considered unresponsive to another 14 requests, *see* Responses to Pace Set 5, Questions 6-9, 12-21. After Pace and Company’s counsel engaged in productive discussions, the Company submitted supplemental responses to ten questions in Pace Set 5 on June 4, 2018, well after the deadline for direct testimony. *See* Supplemental Responses to Pace Set 5, Questions 10-15, 18-21.

Because the Company's Accounting Panel, the panel that responded to Pace's Information Requests concerning the trade association dues, did not address the issue of trade association dues in its direct testimony, and indeed no other party addressed this issue in its direct testimonies, Pace considered it procedurally inappropriate to incorporate the Company's supplemental responses to information requests on this issue in *rebuttal* testimony. Accordingly, Pace seeks to submit supplemental *direct* testimony to address these supplemental responses.<sup>1</sup>

## **II. INCLUSION OF MR. RÁBAGO'S SUPPLEMENTAL DIRECT TESTIMONY WILL AID THE COMMISSION'S INVESTIGATION IN THIS PROCEEDING**

Mr. Rábago's supplemental direct testimony provides his expertise and insight on the question of the cost recovery of trade association dues, as that insight is informed by supplemental responses to Information Requests received after the May 25th deadline for direct testimony. It also provides an update on a June 15, 2018 final decision of the Public Utilities Commission of Colorado on an interim decision cited in Mr. Rábago's direct testimony relating to the minimum system method used in cost of service studies. This supplemental testimony provides information and insight that relevantly supplements testimony already in the record and

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<sup>1</sup> On July 6, 2018, the Hearing Officers issued a Ruling Modifying Procedural Schedule, which adjourned the evidentiary hearing until August 6, 2018. At that time, Pace was awaiting responses to additional Information Requests it had made on July 3, 2018, related to the issue of trade association dues. *See* Request for Information, Pace Set 6. Because Pace anticipated that the responses would be relevant to the subject of Mr. Rábago's supplemental testimony and expected responses by July 13, 2018, it decided to wait to review these responses before filing the supplemental testimony.

Shortly after it received responses to this sixth set of Information Requests, however, it became clear that the evidentiary hearing would in fact begin on August 6. Pace decided that rather than introduce supplemental testimony so close to the start of the hearing, it would simply introduce the Company's supplemental responses through a short direct examination amending and supplementing Mr. Rábago's written pre-filed direct testimony. As a result, Pace continued to hold off on filing the written supplemental testimony. Then, on July 31, 2018, the Company requested an adjournment of the August 6, 2018 hearing, which was granted on August 3, 2018. *See* Ruling Modifying Procedural Schedule (Aug. 3, 2018).

would aid the Commission in reaching a well-substantiated decision on whether the charges and rates proposed by the Company are just and reasonable.<sup>2</sup>

### **III. INCLUSION OF THE SUPPLEMENTAL TESTIMONY WILL NOT PREJUDICE OTHER PARTIES**

Pace requests that Mr. Rábago's direct testimony be accepted for filing also because doing so would not prejudice the other parties in this proceeding. Because the evidentiary hearing has now been postponed until September 4, 2018, there would be ample time for the parties to review this supplemental testimony and provide rebuttal testimony, as appropriate and allowed.

### **CONCLUSION**

Pace therefore respectfully requests that the appended Supplemental Direct Testimony of Karl R. Rábago on Behalf of Pace Energy and Climate Center be accepted for filing in the above-captioned proceeding.

Date: August 6, 2018

Respectfully Submitted,



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Cc: Party List in Case 18-E-0067 (via e-mail; with attachments)  
Party List in Case 18-G-0068 (via e-mail; with attachments)

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<sup>2</sup> N.Y. Pub. Serv. Law § 72; *Niagara Mohawk Power Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 507 N.E.2d 287, 289, 291 (1987).

# **EXHIBIT A**

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Proceeding on Motion of the Commission )  
as to the Rates, Charges, Rules and Regulations ) **Case 18-G-0068**  
of Orange and Rockland Utilities, Inc. )  
for Gas Service )  

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**SUPPLEMENTAL DIRECT TESTIMONY OF KARL R. RÁBAGO  
ON BEHALF OF PACE ENERGY AND CLIMATE CENTER**

July 31, 2018

1                                   **I.       INTRODUCTION AND QUALIFICATIONS**

2   **Q.     Please state your name and business address.**

3   A.     My name is Karl R. Rábago. My business address is 78 North Broadway, White Plains,  
4           New York 10603.

5   **Q.     What is your occupation?**

6   A.     I am the Executive Director of the Pace Energy and Climate Center (“Pace”) at the  
7           Elisabeth Haub School of Law.

8   **Q.     Are you the same Karl R. Rábago who previously submitted direct testimony in**  
9           **these proceedings on behalf of Pace?**

10  A.     Yes.

11  **Q.     What is the purpose of this testimony?**

12  A.     The purpose of this testimony is to provide supplemental testimony on revenue recovery  
13           of costs by Orange and Rockland Utilities, Inc. (“Company”) related to payment of  
14           association dues to the Edison Electric Institute (“EEI”) and the American Gas  
15           Association (“AGA”). This supplemental testimony addresses new information supplied  
16           by the Company in supplemental responses to interrogatories filed by Pace.<sup>1</sup> This  
17           testimony also provides supplemental information relating to a final order by the Public  
18           Utilities Commission of Colorado on an interim decision cited in my pre-filed direct  
19           testimony relating to the minimum system method used in cost of service studies.

20  **Q.     What issues do you address in this supplemental direct testimony?**

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<sup>1</sup> See Company Supplemental responses to Pace 5-10 through 5-15, 5-18 through 5-21; see also Company responses to Pace 6-1 through 6-3.

1 A. In this testimony, I cite the Company's supplemental discovery responses on the issue of  
2 rate payer recovery of payments for association dues to EEI and AGA as evidence that  
3 the Company's request for cost recovery of these dues is wholly unsupported. As a result,  
4 the rates proposed by the Company that request recovery of costs relating to EEI and  
5 AGA dues are unsubstantiated, unjust, and unreasonable. My testimony regarding the  
6 Colorado Public Utilities Commission ("PUC") decision provides supplemental  
7 information about the minimum system method.

#### 8 RATE RECOVERY OF EEI AND AGA DUES

9 **Q. Did you address the issue of rate recovery of costs associated with EEI and AGA**  
10 **dues in your direct testimony?**

11 A. Yes.<sup>2</sup>

12 **Q. What burden does the Company face in seeking rate recovery for its expenses?**

13 A. Under New York law, when a utility seeks to recover costs from ratepayers, the  
14 Commission must determine if the charges and rates are just and reasonable.<sup>3</sup> The utility  
15 bears the burden of demonstrating that its proposed charges and rates are just and  
16 reasonable,<sup>4</sup> and the Commission's decision to approve the recovery of costs must be  
17 rational and supported by substantial evidence.<sup>5</sup>

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<sup>2</sup> See Direct Testimony of Karl R. Rábago on behalf of Pace Energy and Climate Center, at 52-65 (May 25, 2018) ("Rábago Direct Testimony").

<sup>3</sup> N.Y. Pub. Serv. Law § 72; see also *Niagara Mohawk Power Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 507 N.E.2d 287, 289, 291 (1987); *Abrams v. Pub. Serv. Comm'n*, 492 N.E.2d 1193, 1195-96 (1986).

<sup>4</sup> N.Y. Pub. Serv. Law § 66(12)(i); see also *Nat'l Fuel Gas Distribution Corp. v. Pub. Serv. Comm'n*, 16 N.Y.3d 360, 369 (2011); *St. Lawrence Gas Co. v. Pub. Serv. Comm'n*, 368 N.E.2d 1234, 1235 (1977).

<sup>5</sup> N.Y. C.P.L.R. § 7803; see also *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 449 N.Y.S.2d 77, 79-80 (1982).



1           In this case, the Company has the burden of producing substantial evidence  
2           sufficient to allow the Commission to determine that the costs the Company seeks to  
3           recover, including for EEI and AGA dues, support just and reasonable rates and do not  
4           include expenses related to legislative lobbying.<sup>6</sup> The bare assertions of trade associations  
5           are insufficient evidence upon which to base a claim of recovery for costs.<sup>7</sup>

6           The Company does not identify what portion of the fees ultimately sought from  
7           customers contribute to EEI and AGA activities that might benefit rate payers and are  
8           therefore reasonably shouldered by rate payers.<sup>8</sup> In addition, the Company has failed to  
9           meet its burden of demonstrating that the EEI and AGA dues for which it seeks recovery  
10          do not include expenses related to legislative lobbying, as it has made no showing of the  
11          accuracy of the lobbying expenses reported to it by EEI and AGA in invoices.<sup>9</sup> The  
12          invoices by themselves, absent a demonstration of the independent verification of the  
13          underlying assertions, are not a sufficient basis for cost recovery. The Company's failure  
14          is significant in light of the evidence of lobbying and advocacy activities undertaken by  
15          EEI and AGA in my direct testimony; in the absence of a showing of a reasonable

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<sup>6</sup> N.Y. Pub. Serv. Law §114-a (“In determining rates to be charged to customers, the commission shall not include the cost of legislative lobbying on behalf of any public utility as part of any such utility’s operational costs.”)

<sup>7</sup> Even where a utility has submitted an invoice from a trade association, the Commission has found that to be insufficient evidence upon which to base cost recovery. *See Orange and Rockland Utilities, Inc.*, Case Nos. 29046 and 29047, 1986 WL 289251, at \*15 (N.Y.P.S.C. Feb. 11, 1986) (Opinion and Order Determining Revenue Requirement and Rate Design) (finding that “the information relied on by O&R had been furnished by EEI and had not been independently analyzed by the company”). In these cases, the Commission found that the Company had not met its burden of proof that the portion of EEI dues it sought to recover from ratepayers did not include lobbying expenses and allowed recovery of only 50 percent of the Company’s EEI dues.

<sup>8</sup> *See Niagara Mohawk Power Corp.*, 507 N.E.2d at 289-90.

<sup>9</sup> In response to DPS 1-48, the Company reported that the amounts it requested for cost recovery were obtained from invoices provided by EEI and AGA. The Company provided copies of the underlying invoices in response to Pace 6-1, 6-2, and 6-3.

1           apportionment of the dues payments, the only remedy that ensures that customers are not  
2           forced to pay for improper association activities is denial of recovery of any portion of  
3           the dues payments.

4   **Q.   What were your findings, conclusions, and recommendations relating to rate**  
5   **recovery of costs associated with EEI and AGA dues in your direct testimony?**

6   A.   The Company requested approval of rate recovery of more than \$233,000 per year for  
7   dues paid to EEI and AGA. Based on the lack of evidence to support the reasonableness  
8   of recovery of this expense, and the fact that it cannot be determined whether the  
9   Company is requesting that customers pay for lobbying and other advocacy by EEI and  
10   AGA that is counter to the interest of the customers, I recommend disallowance of the  
11   entire requested amount. As I stated in my direct testimony:

12           “The Company must provide sufficiently detailed information regarding the  
13           membership dues cost allocation as an incident to its burden of producing  
14           sufficient evidence that its requested rates are just and reasonable. This evidence  
15           must demonstrate that above-the-line dues to EEI and AGA: (1) directly benefit  
16           ratepayers and (2) do not work contrary to ratepayer interests. Due to the conflict  
17           of interest between those organizations and New York ratepayers, and in the  
18           absence of a third-party audit in the record, it is not reasonable to rely merely  
19           upon the assertions of EEI and AGA themselves. The data submitted by the  
20           Company therefore is inadequate to carry the Company’s burden of demonstrating  
21           that its rates are just and reasonable or to confirm that ratepayers are not being  
22           asked to pay for lobbying or political advocacy activities carried out by the EEI or  
23           AGA . . . . Because the Company has not provided sufficient and competent

1 evidence to support a finding that the dues it is asking ratepayers to pay are a just  
2 and reasonable expense, I recommend that the total amount of requested revenue  
3 requirement related to membership dues in EEI and AGA be disallowed.”<sup>10</sup>

4 **Q. Have your findings, conclusions, and recommendations changed as a result of the**  
5 **supplemental responses provided by the Company relating to EEI and AGA dues?**

6 A. No. On the contrary, the information provided by the Company in its supplemental  
7 responses establishes that the Company has provided no evidence upon which to  
8 conclude that rate recovery of any amounts paid to EEI and AGA from customers is just  
9 and reasonable.

10 **Q. Please explain.**

11 A. The Company’s supplemental discovery responses contain information that was not made  
12 available at the time that my direct testimony was filed in these proceedings. In the  
13 supplemental discovery responses, the Company cannot identify any specific amounts of  
14 EEI or AGA dues, assessments or contributions funded by ratepayers.<sup>11</sup> The Company  
15 “does not track or participate in each and every EEI [or AGA] activity,” and therefore  
16 cannot identify the allocation of dues payments to general EEI and AGA activities, or to  
17 EEI and AGA lobbying, or for any other purpose.<sup>12</sup> The Company’s electric and gas rate  
18 plans do not “explicitly fund activities such as the payment of dues to EEI [or AGA].”<sup>13</sup>  
19 These responses conclusively establish that the Company has provided no evidence  
20 whatsoever to demonstrate that the amounts paid to EEI and AGA in dues that it seeks to

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<sup>10</sup> Rábago Direct Testimony at 63.

<sup>11</sup> Company responses to Pace 5-10 Supplement, Pace 5-11 Supplement.

<sup>12</sup> Company responses to Pace 5-14 Supplement, Pace 5-15 Supplement.

<sup>13</sup> Company responses to Pace 5-12 Supplement, Pace 5-13 Supplement.

1 recover from rate payers are a reasonable cost related to the provision of electric or gas  
2 service.

3 **UPDATE ON COLORADO PUC CASE PROCEEDING NO. 17-AL-0477E**

4 **Q. What was your direct testimony relating to Colorado PUC proceeding No. 17-AL-**  
5 **0477E?**

6 A. In my direct testimony, I reported that in that proceeding, the Public Utilities  
7 Commission of Colorado recently issued an interim decision in a base rates case for  
8 Black Hill/Colorado Electric Utility LP to reverse a long-standing practice of using a  
9 minimum system method. The Commission approved the recommended decision of the  
10 administrative law judge, which included the finding that use of the minimum system  
11 method “results in customer charges continuing not to be based upon cost of service and  
12 [] not just and reasonable without substantial offsetting mitigation.”<sup>14</sup>

13 **Q. What update do you provide regarding that proceeding in Colorado?**

14 A. In its final order in Proceeding No. 17-AL-0477E,<sup>15</sup> the Colorado PUC affirmed its  
15 interim decision rejecting further use of the minimum system method used by the utility,  
16 Black Hills/Colorado Electric Utility LP. In that decision, the Commission held:

17 49. The Commission upholds the ALJ’s rejection of the minimum intercept  
18 method and adopts without modification the findings and conclusions in the  
19 Recommended Decision that are directed at the minimum intercept method.

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<sup>14</sup> *In the Matter of Advice Letter No. 742 Filed by Black Hills/Colorado Elec. Util. LP to Update Base Rates As Required by Comm’n Decision No. C16-1140 to Become Effective Aug. 11, 2017*, Proceeding 17AL-0477E, 2018 WL 582562, at \*15 (Colo. P.U.C. Jan. 23, 2018) (Recommended Decision), *adopted in* 2018 WL 1255012 (Colo. P.U.C. Mar. 6, 2018) (Interim Decision).

<sup>15</sup> *In the Matter of Advice Letter No. 742 Filed by Black Hills/Colorado Elec. Util. LP to Update Base Rates As Required by Comm’n Decision No. C16-1140 Effective Aug. 11, 2017*, Proceeding 17AL-0477E, 2018 WL 3091045 (Colo. P.U.C. June 15, 2018).

1           50. The positions advocated . . . in opposition to the minimum intercept method  
2           are persuasive. The Commission agrees that Black Hills’ use of the minimum  
3           intercept method is an anomaly among rate-regulated utilities in Colorado and  
4           that an increased customer fixed charge has not been shown to outweigh the  
5           public interest of allowing customers to control their utility bills and energy  
6           efficiency. The Commission further agrees with the ALJ that public policy  
7           considerations regarding low-income customers and energy conservation require  
8           consideration of the reasonableness of level of fixed charges.<sup>16</sup>

9   **Q.    Does this conclude your supplemental testimony?**

10  **A.    Yes.**

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<sup>16</sup> *Id.* at \*9.