

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

CASE 18-E-0067 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Electric Service.

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

RULING DENYING MOTIONS TO SUBMIT  
SUPPLEMENTAL TESTIMONY

(Issued September 21, 2018)

MAUREEN F. LEARY AND DAKIN D. LECAKES,  
Administrative Law Judges:

INTRODUCTION

On August 6, 2018, Earthjustice filed a motion for leave to file the Supplemental Direct Testimony of Karl R. Rabago on behalf of Pace Energy and Climate Center (Pace). On August 7, 2018, pro se intervenor Deborah Kopald filed a motion to file the testimonies of Dr. Timothy Schoechle and Dr. David O. Carpenter together with several exhibits. For the reasons detailed below, we deny both motions.

BACKGROUND

On January 26, 2018, Orange and Rockland Utilities, Inc. (O&R) filed tariff leaves and supporting testimony and exhibits to increase its rates for electric and gas delivery service. On February 5, 2018, and again on June 12, 2018, the Secretary, pursuant to Public Service Law §66(12)(f), issued notices suspending the effective date of the O&R tariff leaves so that a hearing could be held on the proposed increases.

Pursuant to Notices issued February 13, 2018 and March 5, 2018, we held a procedural conference on March 14, 2018, to establish a schedule for the filing of testimony and holding evidentiary hearings. On March 22, 2018, we issued a ruling establishing, in relevant part, that the direct testimony of Department of Public Service trial staff and intervenors be filed by May 25, 2018, and that any rebuttal testimony be filed by June 15, 2018.

Both Pace and Ms. Kopald timely filed direct testimony. Pace also filed rebuttal testimony. On June 15, 2018, O&R filed a motion to strike Ms. Kopald's testimony in its entirety as failing to address issues relevant to the Company's electric and gas rate filings. On September 10, 2018, we issued an order denying O&R's motion to strike, but noting that much of the testimony concerned issues outside the scope of this hearing and that we would allow the testimony only so far as it addressed the ratemaking mechanics of incorporating O&R's Advanced Metering Infrastructure (AMI) expenditures into rates and any related rate design issues.<sup>1</sup>

#### Pace Motion

Pace requests leave to file the Supplemental Direct Testimony of Karl R. Rabago regarding the issue of ratepayer recovery of O&R's payment of association dues to the Edison Electric Institute and the American Gas Association. Pace also requests leave to provide the Colorado Public Utilities Commission's (PUC) final order on appeal from an interim order which was referenced in Mr. Rabago's direct testimony. Pace

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<sup>1</sup> A full recitation of the background on the Commission's approval of O&R's proposed rollout of an AMI program is contained in our ruling on O&R's motion to strike Ms. Kopald's testimony issued on September 10, 2018.

states that it has good cause for its late filing inasmuch as O&R did not respond satisfactorily to a number of discovery requests until June 4, 2018, after the date for submission of direct testimony in these proceedings, but before the date for submission of rebuttal testimony.<sup>2</sup> Pace also maintains that its motion should be granted because it will aid the Commission's investigation into whether O&R's proposed rates are just and reasonable. Pace claims that the testimony would not prejudice other parties because they would have substantial time to review the testimony and prepare for the hearings.

Ms. Kopald's Motion

Ms. Kopald's motion requests leave to file the testimony of two new witnesses to this proceeding and more than 700 pages of additional exhibits. She states that the late filing of testimony and exhibits is necessitated by "new developments regarding smart meters."<sup>3</sup> The testimony of Ms. Kopald's proposed first witness, Dr. David Carpenter, addresses the health effects of low level electromagnetic fields and low intensity non-ionizing radiation. Dr. Carpenter's testimony focuses mostly on a paper he has co-authored that has been accepted for publication by a journal. It summarizes the conclusions of other experts who have studied the health effects of low intensity non-ionizing radiation. The testimony of Ms. Kopald's proposed second witness, Dr. Timothy Schoechle, addresses the issue of whether smart meter technology is suited to real time control of distributed energy resources to provide customers with the ability to control costs and produce economic

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<sup>2</sup> Pace also notes that it did not incorporate the material into rebuttal testimony as it did not believe that the testimony would have been properly submitted as rebuttal.

<sup>3</sup> Kopald Motion, p. 1.

benefits. The testimony primarily focuses on a July 2018 British Infrastructure Group of Parliamentarians report.<sup>4</sup>

O&R Response

On August 10, 2018, O&R responded to both motions. O&R argues that Pace has failed to demonstrate any extraordinary circumstances warranting leave to file additional testimony, and that there are other readily available procedural mechanisms to place the discovery responses and Colorado PUC decision into the record. O&R contends that the threshold for the acceptance of supplemental testimony submitted after the procedural deadline for the filing of testimony should require a showing of more than inconvenient timing to avoid undermining the efficient adjudication of rate proceedings. O&R also observes that the testimony is duplicative of timely submitted testimony, noting that the Pace witness, Karl R. Rabago, specifies that O&R's discovery responses do not change any of his previous conclusions.

Regarding Ms. Kopald's motion, O&R states that its positions in opposition to Pace's motion equally apply to Ms. Kopald's. In addition, O&R asserts that Ms. Kopald's submissions deal solely with issues irrelevant to the rate proceedings and otherwise attempt to relitigate matters already decided by the Commission.

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<sup>4</sup> According to the report, the British Infrastructure Group of Parliamentarians is a "cross-party group dedicated to championing better infrastructure across the United Kingdom."

DISCUSSION

The submission of testimony in Commission proceedings is governed by 16 NYCRR § 4.5. Rule 4.5(b)(4) states that the presiding officers have discretion over how to address noncompliant testimony and should consider issues such as timing, the extent of any noncompliance, and prejudice to the parties.

Pace's motion claims that O&R submitted its responses to discovery too late for their inclusion in Pace's timely filed direct testimony. However, Pace did not object to the timing of O&R's responses at any time before it filed the instant motion. Pace did not contact us prior to the deadline for the submission of direct testimony. Pace did not seek to discuss any issues regarding its discovery to O&R or the company's belated responses; nor did it file any motion to compel. Therefore, Pace did not preserve any argument that its inability to provide timely testimony was solely due to O&R's conduct.

As O&R notes, the supplemental testimony is not necessary to place either its discovery responses or the Colorado PUC order before the Commission. The discovery responses may be entered into the hearing record as exhibits, either through stipulation or cross examination. The PUC final order is a legal document that may be cited in a brief, regardless of its status as a hearing exhibit, and we and the Commission may take administrative notice of it.

Ms. Kopald maintains that her submissions should be allowed because they could not have been produced prior to the deadline for pre-filing testimony. As stated in our September 10 Ruling, the Commission has not given us any indication that it intends to revisit its authorization of the AMI program.<sup>5</sup>

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<sup>5</sup> See Ruling Denying Motion to Strike Testimony (issued September 10, 2018).

Subsequent rate proceedings cannot be used to collaterally attack prior Commission orders. The issues in these rate proceedings are limited to the ratemaking mechanics of incorporating the AMI expenditures into rates, with the opportunity to review the expenditures for their reasonable conformance with the prior Commission approval in the AMI Expansion Order. As Ms. Kopald's submissions are exclusively directed at issues beyond that scope, her motion is denied.

CONCLUSION

For the foregoing reasons, the motions of Pace and Deborah Kopald to file supplemental direct testimony are denied.

(SIGNED)

MAUREEN F. LEARY

(SIGNED)

DAKIN D. LECAKES