STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 16-G-0058 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of KeySpan Gas East Corp. dba Brooklyn Union of L.I. for Gas Service.

CASE 16-G-0059 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of The Brooklyn Union Gas Company dba National Grid NY for Gas Service.

CASE 14-G-0091 - In the Matter of the Acts and Practices of The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid Regarding Billing of Each Company's SC No. 2 Customers from March 2008 to March 2014.

CASE 14-G-0503 – Petition for Approval, Pursuant to Public Service Law, Section 113(2), of a Proposed Allocation of Certain Tax Refunds between KeySpan Gas East Corp. d/b/a National Grid and Ratepayers.

CASE 13-G-0498 - Petition for Approval, Pursuant to Public Service Law, Section 113(2), of a Proposed Allocation of Certain Tax Refunds between KeySpan Gas East Corp. d/b/a National Grid and Ratepayers.

CASE 12-G-0544 - In the Matter of the Commission's Examination of The Brooklyn Union Gas Company d/b/a National Grid NY's Earnings Computation Provisions and Other Continuing Elements of the Applicable Rate Plan.

CASE 11-G-0601 – Petition for Approval, Pursuant to Public Service Law Section 113(2) of a Proposed Allocation of Certain Tax Refunds between KeySpan Gas East Corp. d/b/a National Grid and Ratepayers.

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE STAFF REPLY STATEMENT

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE STAFF
REPLY STATEMENT

INTRODUCTION

On September 7, 2016, the Signatory Parties[1] submitted a Joint Proposal recommending a comprehensive resolution of all issues raised in the

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[1] The Signatory Parties are: The Brooklyn Union Gas Company d/b/a National Grid NY ("KEDNY"), KeySpan Gas East Corporation d/b/a National Grid ("KEDLI") (KEDNY and KEDLI are collectively referred to as the "Companies"), New York State Department of Public Service Staff ("Staff"), the City of New York ("CNY"), Environmental Defense Fund ("EDF"), BBPC, LLC d/b/a Great Eastern Energy ("GEE"), Direct Energy Services, LLC ("Direct"), Consumer Power Advocates ("CPA"), Estates NY Real Estate Services LLC ("Estates"), and Spring Creek Towers.

above-captioned proceedings. On September 9, 2016, Urac Corp. (URAC) filed a Statement in opposition to the Joint Proposal. On September 16, 2016, Staff, the Companies, CNY, CPA, EDF, GEE, Estates and Spring Creek Towers submitted Statements recommending that the Commission adopt the terms of the Joint Proposal. On that same day, the Utility Intervention Unit of the New York State Department of State's Division of Consumer Protection (UIU) filed a Statement on the Joint Proposal in which it neither expressed support for or opposition to the Joint Proposal. Also on that day, the Public Utility Law Project of New York, Inc. (PULP) filed a Statement in opposition to the Joint Proposal. On Monday, September 19, 2016, Potomac Economics, LTD (Potomac), the Market Monitoring Unit (MMU) of the New York Independent System Operator, Inc. (NYISO) filed a Statement in opposition to the Joint Proposal. On September 21, 2016, the Town of Brookhaven (Brookhaven) filed a Statement in opposition to the Joint Proposal.[2] This Reply addresses the issues raised in those Statements in opposition and recommends that the Commission adopt the terms of the Joint Proposal.[3]

ISSUES RAISED BY URAC, PULP, POTOMAC AND BROOKHAVEN

In their respective filings, PULP, URAC, Potomac and Brookhaven raised various issues on the basis of which they oppose the Joint Proposal. PULP raised the following issues: 1) that the Joint Proposal does not satisfy the Commission's standard of review; 2) that allowing full recovery of site investigation and remediation (SIR) costs from customers is unreasonable; 3) that the return on

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[2] By ruling issued September 13, 2016, ALJ Van Ort established a deadline for filing Statements in support or opposition to the Joint Proposal of September 16, 2016. Both Potomac and Brookhaven filed their respective Statements after this deadline, thus impinging on Staff's and other parties' available time to draft replies. However, this Statement does address the issues raised by Potomac and Brookhaven.

[3] Staff also takes this opportunity to correct an erroneous sentence in our Statement. On pages 59-60 of our Statement, the sentence "The Joint Proposal also requires that the Companies discontinue charging reconnection fees to Low Income Program participants, so as to prevent the use of disconnections as a collections tool." was erroneously included. It does not refer to a provision of the Joint Proposal.

equity (ROE) of 9.0% is without a rational basis; 4) that the terminations and uncollectibles incentive mechanism is "flawed in conception and design" and assumes the Companies are complying with the Home Energy Fair Practices Act (HEFPA); 5) that the rate design, applying equal percentage increases to each firm service class and to each usage block within a service class is unreasonable; and 6) that the earnings sharing mechanism (ESM) is overly generous and structurally flawed. URAC raised the following issues: 1) that KEDNY's use of a d/b/a is confusing; 2) that KEDNY should be required to adopt "internal operating policies… as to how to uniformly adhere to its Tariff, Public Service Law, 16 NYCRR and Commission's [sic] Orders;" 3) that the proposed resolution of Case 14-G-0091 is unreasonable; 4) that the tripling and quadrupling provisions of the Customer Service Performance Mechanism should not be removed; 5) that KEDNY should be required to maintain applications of service for longer than required by 16 NYCRR §733.15; 6) that the weather normalization adjustment and base and slope are unreasonably "hidden" from customers; and 7) that KEDNY should be required to modify the manner for migrating customers between schedules within a service classification. Potomac opposed the Joint Proposal's recommended modifications to the balancing provisions for electric generators. Brookhaven raised the following issues: 1) that the Companies' shareholders should bear "a greater proportion of the demand related costs…"; 2) that the rate design should shift more cost recovery into the variable usage charges from the fixed minimum charge; and 3) that there should be an incentive for the Companies' to seek recovery of SIR costs from other responsible third-parties.

As explained in Staff's Statement in Support, the Joint Proposal meets the requirements of the Commission's Settlement Guidelines. The Joint Proposal is consistent with the Commission's goals and policies, compares favorably with the likely result of a litigated case, fairly balances the interests of ratepayers and investors, and provides the Commission with a rational basis for its decision. The issues raised by PULP, URAC and Potomac, which are discussed in detail below,

should present no barrier to the Commission adopting the terms of the Joint Proposal.

DISCUSSION

1. Response to the Issues Raised by PULP

1.1. The Joint Proposal satisfies the Commission's standard of review.

PULP entitled a section of its Statement "The JP fails to satisfy the Commission's standard of review." In that section, PULP states "while the Commission can be deferential to settlements agreed upon by normally adversarial parties, that deference is not without limits. Nor is that deference without rational boundaries." PULP then correctly sets forth the four factors that should be addressed in reviewing a Joint Proposal.[4] PULP also asserts that the "end result of the proposed rate design and ROE is to effect, by Rate Year 3, a 40% increase in delivery rates for the typical residential heating customer…" and that such an outcome is "completely unbalanced in favor of the Companies' interests, as opposed to balancing the Companies' and ratepayers' interests." PULP's assertions lack merit, and in fact are contrary to the reality of the balancing of ratepayer and shareholder interests in the Joint Proposal.

First, the rate increases, while significant, are justified by the totality of the Companies' cost to provide safe and adequate service, as set forth in great detail in pre-filed testimony and in Staff's and other parties' Statements in support of the Joint Proposal. Moreover, only the Companies and Staff set forth full revenue requirements for rate year one (RY1), which is calendar year 2017, in their respective testimonies. A comparison of the RY1 revenue requirements in the Joint

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[4] PULP Statement, pp. 5-6.

Proposal to those in Staff's and the Companies' testimonies demonstrates that the Joint Proposal hews quite close to Staff's overall positions.[5]

Second, PULP chooses to ignore the fact that the Joint Proposal provides a realistic and reasonable opportunity to minimize the impact of unavoidable increases in customers' rates. PULP's mission is, in part to represent "low-income utility consumers in electric, natural gas, telephone and other utility related matters."[6] This is a worthy goal, and PULP can bring a worthwhile perspective to many proceedings before the Commission. However, in this instance, the totality of PULP's proposals would result in an outcome in these proceedings that is manifestly against the public interest in general, and the interests of low-income customers of KEDNY and KEDLI in particular.

Specifically, while PULP asserts that it merely suggests "modifications to the Joint Proposal" in reality, its proposals seek to shred the delicate balance reached in the Joint Proposal. As such, were PULP's arguments to be successful, one likely outcome of such a scenario, based on Staff's testimony, would be aggregate 31% and 18% delivery increases for KEDNY and KEDLI, respectively, in 2017 alone. This would likely be followed by the Companies filing new rate cases next year, seeking additional rate increases for 2018, which, is rate year two (RY2) in the Joint Proposal. In those new proceedings, there is no guarantee that the outcome would be limited to the $41.022 million and $19.594 million for KEDNY and KEDLI, respectively, recommended in the Joint Proposal for RY2. Moreover, as explained below, PULP's proposal that the Companies' bear 15% of SIR costs would likely result in higher costs of capital for the Companies, which would result in

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[5] As set forth in Section 2.1 of Staff's Statement in Support, for KEDLI, Staff proposed a revenue requirement of approximately $116 million and KEDLI proposed approximately $180 million, whereas the Joint Proposal incorporates a revenue requirement of approximately $112 million. For KEDNY, Staff proposed a revenue requirement of approximately $263 million and KEDNY proposed approximately $331 million, whereas the Joint Proposal incorporates a revenue requirement of approximately $272 million. Of note the difference between Staff's testimony and the Joint Proposal on the KEDNY revenue requirement can be entirely attributed to an increase in funding and benefits for the low income assistance program in RY1.

[6] http://utilityproject.org/about/, accessed September 22, 2016.

higher rates for customers stretching out for years to come. In short, the logical outcome of PULP's positions would be increased burdens on the customers of the Companies, and not in the public interest.

Third, while PULP makes assertions, nowhere in this section of PULP's Statement, nor anywhere else in that Statement, does PULP explain how the Joint Proposal is outside of the "rational boundaries" or "limits of "deference" that PULP asserts the Commission may apply in reviewing Joint Proposals. As thoroughly demonstrated in Staff's Statement in Support and in the Statements filed by other parties supporting the Joint Proposal, the Joint Proposal satisfies the Commission's standard of review. Staff provided an explanation of the support for the Joint Proposal, provision by provision, including how the provisions compare to Staff's and other parties' litigated positions, and the likely outcome of litigation in this proceeding. The sections below respond in detail to each of PULP's assertions in opposition to specific provisions of the Joint Proposal.

1.2. The Joint Proposal reasonably resolves the SIR costs.

PULP raises many arguments regarding the treatment of SIR costs in the Joint Proposal, none of which should be given any credence. Ultimately, PULP proposes that the Companies' shareholders be required to bear 15% of the Companies' SIR costs.[7] Each argument is addressed below. First, PULP acknowledges that in past cases, the Commission has allowed the Companies' to recover 100% of their SIR costs from ratepayers. PULP then correctly states that in Case 11-M-0034,[8] the Commission reserved the right to require shareholders to bear a portion of SIR costs "under specific company and rate case circumstances."[9] However, context is vitally important. Specifically, the Commission stated "sharing

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7 PULP Statement, p. 25. It is unclear whether PULP would have the Companies' shoulder 15% of only prospective expenses, or of the deferred, but as yet unrecovered, balances as well.

8 CASE 11-M-0034, Review and Evaluation of Utilities SIR Costs, Order Concerning Costs for Site investigation and Remediation (issued November 28, 2012) (SIR Order).

9 PULP Statement, pp. 9-10.

of some portion of SIR [costs] may serve as an incentive to constrain SIR costs for utilities that appear to need such an incentive"[10] and:

> However, we recognize that sharing as an incentive in specific cases may be a useful tool to ensure utility attention to cost controls. Should there be indications, in future rate reviews, that a utility's cost controls are inadequate, sharing of remediation costs should be considered an appropriate tool to redress such problems. Should utility practices be shown to stray from an adopted best practices compilation, a specific incentive plan can be crafted to reward improvement, deter backsliding, or both. (emphasis added)[11]

PULP does not provide, nor can it cite, any evidence to suggest that the Companies' have acted imprudently or have not followed best practices. In fact, Staff conducted a thorough review of the Companies' SIR activities and concluded that the Companies utilize competitive bidding and other means to minimize costs for SIR sites, while pursuing cost sharing and cost recovery from insurance carriers and other potentially responsible parties (PRPs).[12] Thus, the record does not support PULP's proposal to shift of 15% of SIR costs to shareholders.

Second, PULP asserts that without shifting costs to shareholders, the Companies "have no financial incentive to worry about the costs of site remediation when considering site management decisions."[13] This statement is untrue. As just explained, the SIR Order places the Companies on notice that their SIR costs and activities will be reviewed in each rate case, and that, if there is a need to address a lack of rigger in cost controls, shareholders may be required to bear a portion of the SIR costs.

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[10] SIR Order, p. 12.

[11] SIR Order, pp. 21-22.

[12] Ex. 318, pp. 18-24. In its Statement, Brookhaven also seeks an "incentive" for the Companies to seek PRPs to help shoulder the burden of SIR costs. As explained in testimony, the record demonstrates that the Companies already aggressively seek PRPs. Thus, Brookhaven's proposal is unnecessary and should be denied.

[13] PULP Statement, p. 13.

Third, PULP points to Case 10-E-0050, a rate proceeding concerning Niagara Mohawk Power Corporation d/b/a National Grid (NMPC), which provided for an 80/20 sharing mechanism for SIR costs in excess of the rate year allowance.[14] PULP quotes at length from this order, including the statement that "In addition, the historic allocation of responsibility for SIR costs should be reexamined, to find relief for ratepayers and to consider arrangements for equitably sharing the burdens of clean-up." It bears noting that the order in Case 10-E-0050 was issued prior to the start of Case 11-M-0034. Thus, the reexamination of the allocation of responsibility for SIR costs has now been conducted, and the Commission declined to include a cost sharing mechanism as set out in Case 10-E-0050 on a generic basis, noting that such a mechanism could have unintended and unwanted consequences.[15]

Fourth, PULP asserts that the circumstances "compelling" the shift of a portion of the costs to shareholders is that the SIR costs associated with Gowanus Canal & Newtown Creek are not included and cannot be determined at this time.[16] As with its other arguments, this equally lacks merit. That these costs are not included in the revenue requirement and cannot be determined at this time is not the fault of the utility, specifically in this case KEDNY. Instead it is due to the fact that the SIR projects are still being developed, in concert with the New York State Department of Environmental Conservation, and because KEDNY is actively seeking other PRPs to help shoulder the costs, thus potentially minimizing KEDNY's portion of the overall SIR costs for each project.[17]

Fifth, PULP spends a fair amount of time explaining the large current deferred balance and the estimates of future expenses. That these are large figures

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[14] Case 10-E-0050, NMPC – Electric Rates, Order Establishing Rates for Electric Service (issued January 24, 2011).

[15] SIR Order, pp. 20-21.

[16] PULP Statement, p. 11.

[17] Ex. 318, pp. 12, 22-23.

is no secret, and the magnitude of the costs, if necessary and prudently incurred, provides no basis for an exclusion on its own. PULP also expresses concern about the bill impacts of these costs. While the bill impacts are not ideal, the Joint Proposal includes provision to mitigate those impacts, for example, by extending the recovery of the current deferral balances to 10 years, and limiting the potential recovery through the surcharge in RY2 and RY3. The alternative would simply be ever increasing deferral balances, for which customers would also pay carrying charges. Moreover, PULP does not address the potential financial consequences of its proposal to shift 15% of SIR costs to shareholders. The SIR Order addressed these potential consequences at length, and concluded that a 10% sharing requirement would result in a "credible threat of credit downgrades that cannot be disregarded."[18] Such a downgrade would increase the Companies' cost of capital, which would undoubtedly be incorporated in higher rates charged to customers for years to come.

Sixth, PULP asserts that the SIR Recovery Surcharge cap as an effort to "[insulate] the potential annual implementation of the surcharge from the transparency and accountability of a major rate case…"[19] This is an unwarranted and false assertion. Staff supports the limitation on the SIR Recovery Surcharge cap of 2% because it limits the impact on customers while still helping to avoid potentially runaway deferral balances requiring future recovery. The Companies and Staff have been abundantly transparent regarding the high level of SIR costs. Further, this borders on an *ad hominem* attack, besmirching the motives of the Signatory Parties, and attempts to (erroneously and inappropriately) characterize confidential settlement discussions. As such, it should be discounted entirely.

Seventh, PULP asserts that costs to pursue recovery (presumably from other potentially responsible parties, though this is not clear) can be included in the

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[18] SIR Order, p. 17.

[19] PULP Statement, p. 11.

reconciliation of SIR costs "with no limitation or review process of expenses prior to reconciliation."[20] This results from a misunderstanding of the review process for SIR costs. That the costs can be reconciled merely means that such costs can be added to the deferral balance. However, Staff and the Commission have the ability to, and do, review the costs included in that balance. Based on that review, the Commission can require that certain costs be removed from that balance if they were imprudently incurred or otherwise improperly included in the deferral balance.

Eighth, PULP asserts that it is "inconceivable that the JP does not include any type of market-based inducement for the Companies to overcome their business-as-usual inertia and strenuously advocate to lower their SIR expenses."[21] PULP has provided absolutely zero evidence to support a contention that the Companies are not working to advocate lower SIR expenses. In fact, as explained above, Staff's review of the Companies' "business-as-usual" in their SIR activities demonstrates that the Companies appropriately try to minimize the costs of the SIR activities for which they are responsible and have made great strides in locating PRPs to help shoulder the burden of cleaning up SIR sites.[22]

Ninth, PULP asserts that there is "a problem with New York's regulatory regime that allows shareholders to earn a return on SIR expenses."[23] The Companies have committed funds to perform the mandated SIR activities, and absent immediate recovery of those costs within the rate year, must finance those costs. The Joint Proposal reasonably allows the Companies to recover the costs of financing the mandated SIR activities they undertake.

Finally, PULP asserts that allowing recovery of SIR costs from customers "sends a perverse market signal to utilities that disincentivizes them

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[20] PULP Statement, p. 12-13.

[21] PULP Statement, p. 24.

[22] Ex. 318, pp. 18-24.

[23] PULP Statement, p. 24.

from making prudent investment choices to avoid potential superfund sites, such as when buying an existing utility with significant toxic sites, as was the case when National Grid purchased KeySpan (f/k/a Brooklyn Union Gas)."[24] Whatever PULP's intent, the example given would have no impact on the SIR costs incurred by the gas company, or companies, currently serving Brooklyn, Staten Island and Long Island. Had National Grid not acquired KEDNY in 2007, KEDNY would still have the same SIR liabilities today, and it would still seek to recover the costs of those liabilities from ratepayers, it simply would not be known as National Grid.

1.3. The Joint Proposal incorporates a reasonable return on equity supported by a rational basis.

With regard to ROE, PULP also makes a number of unpersuasive arguments, which are addressed below. First, that the 9.0% ROE has no reasonable basis. Along these lines, PULP asserts that setting ROEs higher than would be established in a litigated case is unlawful and unreasonable;[25] and that stay-out premiums are unlawful as "[t]he Public Service Law, however, does not authorize the Commission to approve ROEs higher than justified by evidence in multi-year cases simply for the sake of avoiding future rate reviews."[26]

PULP is incorrect, the 9.0% ROE incorporated in the Joint Proposal is based on a reasonable assessment of the circumstances, and the potential outcomes of litigating these proceedings. For a one year litigated rate plan Staff recommended an ROE of 8.6%.[27] The Joint Proposal sets rates for three years, and provides a number of benefits to customers, while increasing the financial and business risk facing the Companies. The benefits for customers of a three-year rate plan in this instance start with levelized rates, which mitigate the impact of large,

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[24] PULP Statement, p. 7.

[25] PULP Statement, p. 15.

[26] PULP Statement, p. 17. This quote is another example of PULP engaging in unsupported and incorrect attacks on the motivations of the Signatory Parties. Such attacks directed at parties' motivations, even if true, are improper and counterproductive.

[27] Ex. 357, p. 5.

but necessary delivery rate increases. Having rates set for three years also allows predictability, so that customers may reasonably account for future utility costs. Third, the Joint Proposal includes provisions regarding the low income assistance program, which, absent a multi-year rate plan, may not come to pass in these proceedings. These include accelerating the timeframe for increasing discounts available to KEDNY customers and KEDNY's matching of customers with New York City's Human Resources Administration.[28] Another example of the benefits of a multi-year rate plan are the incentives which will help drive KEDNY and KEDLI to maximize the number of customers on their respective systems.[29] The more customers KEDNY and KEDLI add to their systems, the greater the base across which the costs of operating the systems can be spread, thus minimizing the burden to be shouldered by each individual customer.

Moreover, by precluding themselves from filing for new rates to be effective during the next three years, KEDNY and KEDLI do take on more risk than under a one-year rate plan.[30] In particular, if financing costs rise during the course of the rate plan, the Companies bear the risk of rates having been established at levels below its cost of equity. The Commission has consistently recognized this additional risk when establishing ROEs in multi-year rate plans. In addition, with regard to potential litigated outcomes, PULP presumes that Commission would set an ROE at Staff's litigated position, which is not guaranteed. In arriving at an appropriate stay-out premium to reflect these benefits of a multi-year rate plan, in testimony, Staff did note that the value "typically range[s] between 30 and 50 basis points for three-year rate plans."[31] Finally, though not

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[28] Ex. 506, Section IV.9.9.1.1.

[29] Ex. 506, Sections IV.9.4, V.9.6.

[30] PULP cites Staff testimony regarding a number of mechanisms which mitigate the risks faced by the Companies. PULP Statement, pp. 17-18. However, the testimony cited by PULP refers to the level of risk the Companies face during a one-year rate plan. While these mechanisms still mitigate the risks faced by the Companies during a multi-year rate plan, the level of risk in a multi-year rate plan is logically greater.

[31] Ex. 357, p. 47.

controlling, it is worth noting that, the 9.0% ROE incorporated in the Joint Proposal is consistent with the ROE adopted by the Commission in recent multi-year rate plans.[32] Thus, the Joint Proposal's recommended 9.0% ROE is reasonable, has a rational basis and should be approved.

Second, PULP cites NY Telephone Co. v. PSC, 64 A.D.2d 232 (3rd Dep't 1978) as "binding precedent" that the Commission may only choose one of the ROEs supported by expert testimony, and cannot choose a compromise position within the range of ROEs supported by testimony.[33] In that case, there were five different approaches to ROE proposed by various parties in testimony, and the Commission chose one of those approaches.[34] The Court found that the Commission had a rational basis for that decision. PULP asserts that this means the Commission may only select an ROE based on one of the approaches supported by expert testimony, and cannot choose a compromise option. Such an interpretation is unreasonable, both logically and based on the practical results. The Court in NY Telephone did not have the opportunity to pass on a Commission decision predicated on a compromise ROE between multiple proposed methodologies and one cannot make the logical leap from the Court's determination in NY Telephone, that the Commission's selection of a compromise ROE would be without a rational basis as a matter of law. Furthermore, to credit PULP's interpretation, the Commission would be unable to choose a compromise position on any issue, but would be

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[32] Cases 14-E-0493 & 14-G-0494, Orange and Rockland Utilities, Inc. – Electric and Gas Rates, Order Adopting Terms of Joint Proposal and Establishing Electric and Gas Rate Plans (issued October 16, 2015), p. 11; Case 15-E-0283, et al., New York State Electric & Gas Corporation (NYSEG) and Rochester Gas & Electric Corporation (RG&E) – Electric and Gas Rates, Order Approving Electric and Gas Rate Plans in Accord with Joint Proposal (issued June 15, 2016) (2015 NYSEG and RG&E Rate Order), p. 32; Case 15-G-0382, St. Lawrence Gas Company, Inc. – Rates, Order Establishing Multi-year Rate Plan (issued July 15, 2016), p. 23. Additionally, in Cases 16-E-0060 & 16-G-0061, Consolidated Edison Company of New York, Inc. (Con Edison) – Electric and Gas Rates, Con Edison, Staff and other parties filed a Joint Proposal on September 19, 2016, which also incorporates a 9.0% ROE.

[33] PULP Statement, p. 15-16.

[34] NY Telephone at 239.

constrained to selecting one of the positions set forth in parties' testimony. Such a conclusion leads to irrational and practically unworkable results.

1.4. The Joint Proposal's terminations and uncollectibles incentive is a reasonable mechanism to incent the Companies to make efforts to reduce terminations and uncollectibles.

With regard to the positive incentive for the Companies to reduce both terminations and uncollectibles included in the Joint Proposal, PULP raises two issues. First PULP raises concerns with the mechanism itself, specifically that it would allow the Companies to earn an incentive based on implementing actions already implemented by other utilities, and that not including a symmetrical negative revenue adjustment [NRA] is without "testimonial evidence" and, therefore without a "rational basis."[35] PULP correctly states that the goals of the positive incentive are "to encourage innovation and greater focus regarding an issue of concern." However, PULP believes that since Central Hudson, whose current rate plan also includes a similar metric, has already filed reports explaining actions it has taken to reduce terminations and uncollectibles, the mechanism in this Joint Proposal is unnecessary "to encourage innovation."[36] This argument should be given no moment for two reasons. First, in its conclusion, PULP omits that one of the goals of the positive mechanism is to encourage "greater focus regarding an issue of concern," which, still could be furthered by the incentive included in the Joint Proposal, even accepting PULP's assertion that innovation is no longer necessary. Second, PULP appears to believe that just because Central Hudson has demonstrated some activities that worked in its territory, that KEDNY and KEDLI would necessarily not have to innovate to constructively apply those activities to their respective service territories, or that KEDNY and KEDLI necessarily would not have to develop other activities to achieve results good enough to earn the proposed incentives. Turning to PULP's assertion that not including a negative

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[35] PULP Statement, p. 19-21.

[36] PULP Statement, p. 19.

incentive is without rational basis, Staff believes that the positive-only incentive is sufficient to incent the Companies to innovate and focus on the goal of decreasing both terminations and uncollectibles.

Second, PULP asserts that the Commission should not adopt the incentive "until it can be certain that the Companies are in compliance with HEFPA before termination on accounts occurs."[37] PULP asserts that "HEFPA requires that all customers in arrears are provided with the opportunity to arrange a DPA [deferred payment agreement] with the Companies and requires that no termination occur unless a customer has failed to meet the terms of a written DPA…."[38] However, HEFPA requires only that a utility not terminate a customer unless the utility "offers such customer a deferred payment agreement…."[39] The law cannot compel a customer to enter into a DPA with the utility, and therefore does not restrict the utility from taking action based solely on the choice of the customer. Moreover, in support of this claim, PULP relies only on a statistical evaluation in which it did not find the correlation between the percentage of customers in arrears and the number of DPAs made that it states should be expected.[40] PULP does not attempt to show causation, only a correlation. Further, PULP ignores the possibility that other factors could be influencing the number of DPAs offered. A non-exhaustive list of potential other factors includes: 1) that many of the Companies' gas customers are non-heaters, with low monthly bills that may not require a DPA; and 2) that customers may not seek a DPA until faced with termination or immediately after being terminated. Moreover, PULP has not provided evidence of KEDNY and KEDLI failing to comply with HEFPA.

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37 PULP Statement, p. 19-20.

38 PULP Statement, p. 20.

39 Public Service Law §37; 16 NYCRR §11.10. Of course, if a customer has entered into a DPA, then a utility cannot terminate the customer as long as he or she continues to comply with the terms of the DPA.

40 PULP Statement, p. 20.

Based solely on its statistical analysis, PULP asserts that the Commission needs to establish an "independent working group … with the authority to (a) audit all of KEDNY's accounts 'Eligible for Field Action' as of December 31, 2015 and terminations from January 1, 2016 to the present; and (b) audit all of KEDLI's residential terminations from January 1, 2014 through the present."[41] PULP asserts that these audits would help ensure the Companies' are in compliance with HEFPA, even though PULP has provided zero evidence of problems with the Companies compliance. Absent any significant evidence, PULP's proposal amounts merely to a wild goose chase, which is inherently unreasonable and should be rejected.

1.5. The Joint Proposal's rate design is reasonable.

PULP's criticism that the rate design under the Joint Proposal would continue (or increase for some classes) what it describes as "high minimum customer charges" and that the rate design should instead use lower minimum customer charges with inclining blocks should be rejected by the Commission.[42] While inclining blocks may offer some customers the incentive to reduce their usage, PULP's proposal to modify the Joint Proposal's rate design would be inappropriate in this particular instance in light of the significant revenue increases proposed for the Companies. Moreover, absent a detailed analysis of the impacts of inclining block rates, there is a concern that low income heating customers may actually be harmed by inclining block rates. This is because low income heating customers tend to live in older housing stock or rent and may not be able to control the energy efficiency of their homes or heating equipment. These customers would not be able to react to the price signal of inclining block rates and may simply be forced to pay higher inclining block rates.

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41 PULP Statement, p. 25.

42 PULP Statement, pp 21-22 and 25. Brookhaven, in its Statement, raises a similar concern regarding the rate design.

The proposed revenue requirement increases coupled, with a rate design that lowers the minimum charges and employs inclining blocks, would exacerbate the impact of the incremental revenue requirements increase for many customers as the use of inclining blocks would result in an additional rate increase to customers greater than those indicated in the Joint Proposal.[43] Staff and the Signatory Parties did not ignore these rate design issues, as PULP claims. Instead, we believe that it is appropriate, in light of these substantial revenue requirement increases, to not modify the current rate design structures of the Companies' service classes in the manner proposed by PULP.

1.6. The Joint Proposal's earnings sharing mechanism is reasonable.

According to PULP, "[a] reasonable ESM is one that protects customers in the event that there is an over-earning by the Companies and incentivizes the Companies to find savings which would be recognized in any future rate proceedings."[44] PULP asserts that, with regard to the 50 basis point dead band in the Joint Proposal: "There is simply no compelling logical or factual reason for a dead band such as the one proposed in the JP other than saying it was a result of compromises among the parties." Finally, PULP appears to recommend an ESM which requires the Companies use all earnings in excess of the allowed ROE (i.e., without a dead band) to pay down SIR costs.[45]

PULP's assertions are without merit. First, the very logical reason to include a 50 basis point dead band is to incent the Companies "to find savings which would be recognized in any future rate proceedings."[46] To remove the dead band

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43 Ex. 506, Appendix 3, Sch. 2, p.1.

44 PULP Statement, p. 22, citing 2015 NYSEG and RG&E Rate Order.

45 PULP Statement, p. 24. PULP also asserts that "savings from a lowered ROE and ESM could result in a significant reduction of rates, and customer bills, in the Rate Plan." With regard to the ESM, this statement is not true. Whether any earnings are shared with customers through the ESM, at whatever level such sharing begins, has zero effect on the rates in effect during the term of the rate plan. Such shared earnings are deferred for disposition in a future case or applied to deferrals which would not otherwise be recovered until a future rate case.

46 Supra, n. 44.

would obviate this incentive. Second, it should be noted that the 2015 NYSEG and RG&E Rate Order, which PULP cites approvingly, includes a dead band of 50 basis points during the first rate year, which actually increases to 65 basis points and then 75 basis points in the out years of the rate plan.[47] In comparison, logic dictates the conclusion that that the ESM in the Joint Proposal offers customers more protection against potential overearning by the Companies.

Finally, with regard to the use of overearnings to offset SIR costs, UIU also raised a similar issue in its Statement and provides a more complete explanation than PULP has. Staff acknowledges that the rate plan adopted for Con Edison in 2014 provides that half of the Company's share of overearnings above the dead band would be used to offset SIR costs.[48] Clearly, such a proposal is not unreasonable, however it was not included in the Joint Proposal in these proceedings. It is important to note that PULP seeks to go much further than the 2014 Con Edison Rate Order it cites. PULP seeks to require all earnings above the allowed ROE be used to offset SIR costs. PULP has offered no support for such a drastic departure from the ESMs adopted in the past by the Commission, and, as explained above, the removal of the dead band would undermine one of the goals of the ESM. Accordingly, PULP's proposal should be rejected.

2. Response to the Issues Raised by URAC

2.1. All Parties were provided sufficient notice and opportunity to participate in all settlement discussions.

URAC alleges that Staff was reluctant to hear its concerns in this case and therefore placed URAC on the sidelines of the negotiations that created the Joint Proposal.[49] This is not true. As explained in the Joint Proposal and in Staff's

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47 2015 NYSEG and RG&E Rate Order, p. 13.

48 Case 13-E-0030 et al., Con Edison – Electric, Gas and Steam Rates, Order Approving Electric, Gas and Steam Rate Plans in Accord with Joint Proposal (issued February 21, 2014) (2014 Con Edison Rate Order), p. 14.

49 URAC Statement, p. 1.

Statement, negotiations were held on June 14, 17, 22-24, 27, and 29-30, July 6, 12-15, and 20-21, and August 16-17. All settlement conferences were duly noticed to the active parties, including URAC, and held in person or via telephone conference. In person conferences included the option to participate via telephone.

In advance of all settlement meetings each Active Party was provided with notice of each meeting. Every party was provided copies of all documents to be discussed. Each Active Party had the opportunity to participate, even if that Party had notified the other Active Parties of its decision not to participate in any settlement discussions, nor to agree to any joint proposal. Active Parties were in no way precluded from participation in settlement discussions.

2.2. The use of a d/b/a is an acceptable practice and the proposal to seek a name change fails to consider its appropriateness or the cost to ratepayers.

URAC argues that KEDNY utilizes various names or titles on customer bills and in its approved tariff that can be confusing to customers, thereby, misdirecting customers as to what entity services them.[50] URAC has not provided evidence that such confusion exists. URAC further argues that KEDNY should amend its tariff, its bill format, and/or include in all customer correspondence an explanation that KEDNY is governed by The Brooklyn Union Gas Company tariffs.[51]

The use of a trade name or the inclusion of a "d/b/a name" as used by KEDNY is an acceptable business practice in New York State. URAC also fails to consider the costs of pursuing the name change, and fails to assess whether any associated cost should be borne by either the Company or ratepayers. Moreover, to the extent that actual confusion exists, actions to mitigate confusion can be taken without imposing a cost on ratepayers or necessitating Commission action.

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[50] URAC Statement, p. 2.

[51] Id.

An example of an action to mitigate any confusion is a currently pending modification to the Department's Electronic Tariff System (ETS)[52] to include a notification that National Grid has regional affiliates KEDNY, KEDLI and NMPC and identifies the appropriate tariff by service territory. As such, URAC's proposal to mandate that KEDNY pursue a name change should be rejected.

2.3. Concerns regarding access to particular documents related to an individual customer's complaint are not germane to rate proceedings.

URAC states that the Companies provided access, during the discovery phase of Cases 16-G-0058 and 16-G-0059, to documents concerning the Companies' operating procedures whereas when URAC has made requests for similar documents within particular customer complaint cases, the Companies have not provided such documents. URAC argues that this violates the Companies' statutory obligations to treat customers in similar and fair fashion.[53]

While many issues affecting all customers are considered within rate proceedings, such proceedings are not the appropriate arena to re-litigate individual customer complaints. Resolution of questions regarding appropriate access to documents in an individual consumer complaint case are most appropriately addressed in that individual case through the Department's Customer Complaint Procedures set forth in 16 NYCRR Part 12. Therefore, URAC's concerns are no barrier to adoption of the Joint Proposal.

2.4. The Joint Proposal reasonably resolves the issues raised in Case 14-G-0091 in a manner that provides an appropriate relief for potentially affected SC 2 customers.

URAC argues that credits contemplated in the Joint Proposal related to Case 14-G-0091 are insufficient and do not accurately address the amount owed

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[52] ETS is accessible at: https://www2.dps.ny.gov/ETS/home/index.cfm, accessed on September 22, 2016.

[53] URAC Statement, p. 3.

to customers.[54] URAC argues that the refund is more appropriately calculated at approximately $12 million dollars.[55] Furthermore, URAC argues that the refund provided by the Joint Proposal should not be adopted and these provisions should be dealt with separate from consideration of the Joint Proposal in Case 14-G-0091.[56]

Staff, in testimony, proposed a $9.3 million one-time credit to the potentially affected customers.[57] This was based on Staff's assessment that the aggregate refunds due to customers likely amounted to approximately $2.7 million, extrapolating from KEDLI's results. Staff also understood that, for KEDNY to undertake a review in order to identify the individual affected customers owed a refund, would cost an estimated $9.4 million, more than three times the expected level of refunds. Accordingly, Staff identified a method that avoided spending $9.4 million on administrative tasks and instead utilized those funds to provide a larger than otherwise anticipated benefit to potentially affected customers.[58] Under the provisions of the Joint Proposal, all potentially affected customers would share in a $6 million one-time credit. The one-time credit as provided for in the Joint Proposal provides immediate resolution of Case 14-G-0091 for KEDNY customers. This solution overcomes the costly and complex issue of determining individual refunds which would take additional time at a considerable cost to those involved, thereby producing lesser refunds overall.

Thus, the refund proposed in the Joint Proposal resolves the issue of conducting a lengthy audit process that ultimately detracts from the overall benefit provided to potentially affected customers. Additionally, the values provided by

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54 The underlying issue was a misclassification by both KEDNY and KEDLI of SC 2 customers as "heating" customers subject to a higher rate, when such customers should have been classified as "non-heating" customers, who are subject to a lower rate. KEDLI was able to identify the particular affected customers and issued refunds. KEDNY, for technical reasons, is unable to identify particular affected customers in a reasonably cost-effective manner.

55 URAC Statement, p. 5.

56 Id.

57 Ex. 332, p. 62.

58 Ex. 332, pp. 66-67.

URAC are vague, based on a miscalculation and do not consider the prohibitive administrative costs of providing individual refunds. Therefore, the Joint Proposal's provision regarding the resolution of Case 14-G-0091 should be adopted.

2.5. The removal of tripling and quadrupling negative revenue adjustments is consistent with the levels of improved service quality demonstrated by the Companies.

URAC argues that the tripling and quadrupling of NRAs for underperformance of service quality[59] should not be removed for KEDNY.[60] URAC argues that KEDNY's poor response time to customer complaints, as well as its overall number of complaints, demonstrates that it has not improved its level of service quality.[61] Therefore, URAC argues that the tripling and quadrupling provisions should remain in place.[62]

URAC claims that the statistics presented by KEDNY indicate a lack of improvement over the Company's Historic Test Year.[63] By extension that any provisions to compel the Company to improve or maintain a level of performance should still remain in effect. Yet, the statistics presented by URAC are incorrect. The figures presented by URAC in its Statement constitute an assessment based on a percentage of complaints; initial versus escalated. This is not how the PSC Complaint rate measure is calculated, nor is it the basis upon which the Company's performance is evaluated.

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[59] The Commission instituted these provisions at the time KeySpan and National grid merged. These provision were intended to ensure consistent customer service amid concerns that "the financial nature of the transaction [merger] poses risks for service quality and customer performance." Case 06-M-0878, National Grid PLC and KeySpan Corporation – Merger, Order Authorizing Acquisition Subject to Conditions (issued September 17, 2007), p. 143.

[60] URAC Statement, p. 5.

[61] Id.

[62] Id.

[63] Id.

KEDNY's PSC Complaint rate performance is based on the number of Escalated Complaints (SRS) per 100,000 customers, not initial complaints (QRS).[64] KEDNY's historic PSC Complaint rate has been satisfactory for the last several years. KEDNY's Complaint Rates were 0.72, 0.59, 0.68, 0.45, and 0.54 in 2015, 2014, 2013, 2012 and 2011, respectively.[65] KEDNY's PSC Complaint Rate performance has been well below the currently effective NRA threshold of 1.1 per 100,000 customers.[66] These figures are made public monthly and on an annual basis through Department reports.

Therefore, the removal of the tripling and quadrupling of NRAs is consistent with the time that has lapsed from the merger and because there is no longer a need for such drastic provisions to incentivize the Company to maintain particular level of performance. KEDNY's performance indicates it has achieved a consistent level of performance that is better than the applicable threshold. Thus, the provisions of the Joint Proposal removing the tripling and quadrupling of NRAs are reasonable and should be adopted.

2.6. Standards regarding record retention are uniformly applicable to all utilities and, therefore, modifications to those standards fall outside the scope of these proceedings.

URAC argues that KEDNY's one-year record retention policy for customer service applications is insufficient for dealing with many issues raised by customers. URAC argues that the Commission should require KEDNY to maintain service applications for at least one year in addition to the life of a customer account. URAC argues that KEDNY should be held to this new standard as precedent to require other utilities to implement a similar policy.[67] URAC asserts

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64 http://www3.dps.ny.gov/W/PSCWeb.nsf/ArticlesByTitle/448C499468E952C085257687006F3A82?OpenDocument, accessed on September 22, 2016.

65 Id.

66 Id.

67 URAC Statement, p. 6.

that since a cost cannot be provided by the Companies that the cost is ultimately minimal.[68]

Sixteen NYCRR §733.15[69] provides that all utilities must keep service applications for up to one year. This provision is applicable to all utilities subject to the Commission's jurisdiction. It would be imprudent to modify this provision for a single utility as that would create inconsistency with the standards applied to other utilities. Although it has an impact on particular customer cases that URAC handles and may, in the future, have an impact on customer complaint rates, discussion of the record retention issue goes beyond the scope of these proceedings. Therefore, URAC's proposal should not be adopted and does not create a barrier to the adoption of the Joint Proposal.

2.7. The provisions included in the Joint Proposal adequately address including additional information on customer bills related to the Companies' Weather Normalization Adjustment (WNA).

URAC argues that the Joint Proposal does not go far enough in requiring the Companies to provide additional information on the WNA on customer's bills. URAC argues that the Companies should include base and slope variable information on customer's bills.[70] URAC argues that the Joint Proposal should be amended to include this "hidden" information.[71]

The Joint Proposal proposes that both KEDNY and KEDLI will post information on their websites that will provide customers information as to how the Weather Normalization Adjustment factor is calculated. The posted information will include the class base load factor, degree day factor, margin, and actual and

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68 Id., n. 8.

69 Item 45(b).

70 URAC Statement, p. 7.

71 Id.

normal degree days. In addition, customers may contact KEDNY's or KEDLI's call center for further assistance.[72]

The base and slope factors are a component of the calculation of the WNA. Including the base and slope factors, and potentially the calculation by which they are derived, and an explanation of this process may pose technical issues as bills are often limited by the coding system used to produce them. Additionally, inclusion of the methodology, the calculation, and any explanatory material may unduly confuse customers or obfuscate other pertinent information on customers' bills. Inclusion of abundant explanatory information and calculations may also unduly impact customers and the Companies by increasing the cost to produce bills that display all this information.

The Joint Proposal contemplates, specifically, that should customers desire to have more information provided to them regarding the WNA, as it applies to an individual's bills, or these factors, the Companies can provide them with this information through their call center representatives. Providing a general methodology as proposed in the Joint Proposal and/or describing this process in detail on a one-on-one basis is preferable when compared to providing extremely detailed and potentially bewildering information on every customer's bill. The Joint Proposal recommends requiring the Companies to make additional information related to the WNA available through their websites and also provides for individual customers who desire to learn more about the WNA applicable to them. Thus, URAC's proposal to amend the sections of the Joint Proposal should be rejected and the Joint Proposal should be adopted.

2.8. The different migration polices for customers under SC 2 and SC 6 are appropriate and the Joint Proposal adequately provides for the future differentiation of SC 2 customers.

URAC argues that KEDNY's customer migration policy is not uniformly applied to customers within two of its service classifications (SC 2 and

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[72] Ex. 506, Sections pp. IV.3.8, V.3.8.

SC 6).[73] URAC argues that under SC 2, KEDNY migrates customers between different rate schedules on an annual basis, pursuant to that customer's usage, while KEDNY does not have a process for migrating customers under SC 6 as they relate to Commercial and Government Properties, and Multi-Family buildings.[74] URAC argues that this sends conflicting messages to customers. URAC also alleges that KEDNY's practice of utilizing customer usage for migration to different rate schedules is indiscriminately applied amongst many of KEDNY's service classes, but always in favor of the utility. URAC proposes that a uniform migration policy be implemented for these service classifications.

Regarding the differentiation between migration policies for SC 6 and SC 2 customers, many SC 6 customers are large and sophisticated commercial customers who may best determine the rate classifications that are suited for their needs. Many SC 2 customers are comparatively small customers. Thus it is appropriate that, while SC 6 customers can determine their need to migrate between schedules, KEDNY proactively evaluates and migrates SC 2 customers. URAC's allegations of impropriety on the part of the Companies appear to speak to issues related to individual customer complaints. URAC fails to support its allegations that the Companies are aware of this problem, and that the Companies are engaging in this practice.

Moreover, the Joint Proposal provides for the Companies to work on new SC 2 classifications that will hopefully eliminate future confusion for customers.[75] The Joint Proposal contemplates the segmenting of the SC 2 class based on usage and collect billing data over RY 2 and RY 3 to develop a more granular cost of service study in the next rate filing. The study will enable the consideration of changes to SC 2 in the Companies' next rate proceedings. Modifying SC 2 will allow for erasing the heat and non-heat distinction, which may

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[73] URAC Statement, p. 8.

[74] Id.

[75] Ex. 506, Section VI.20.

avoid future customer complaints regarding migration; developing a standard RDM mechanism; and honing the rate design to better provide cost signals to customers.[76]

As contemplated by the provisions of the Joint Proposal future rate proceedings based on a cost of services study will provide the necessary information and tools to best address the segmenting of these customers. To the extent URAC alleges other impropriety, those allegations fall outside the scope of these rate proceedings. Therefore, URAC's proposal should be rejected and the provisions of the Joint Proposal should be adopted.

3. Response to the Issues Raised by Potomac

In its filing, Potomac raises four issues in opposition to Section VI.9.1 of the Joint Proposal, specifically: 1) Section VI.9.1 of the Joint Proposal is unreasonable; 2) the proposed definition is designed to influence wholesale electric rates; 3) the provision will tend to increase deviations from the delivered quantity; and, 4) the provision would lead to large increases in costs to consumers. These issues raised by Potomac, which are addressed in detail below, should be rejected by the Commission and Section 9.1 of the Joint Proposal should be adopted in its entirety.

3.1. Section VI.9.1 of the Joint Proposal is reasonable.

In its Statement, Potomac asserts that the KEDLI tariff limits the definition of "unauthorized use"[77] to consumption that occurs after and that is in violation of an explicit instruction from KEDLI—in other words, consumption that is unauthorized. The current KEDLI tariff also imposes balancing charges on deviations (that are not unauthorized) so that generators will make efforts to avoid such deviations, but such deviations are not automatically considered "unauthorized." Proposed tariff language amendments in Section VI.9.1 of the Joint

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[76] Staff Statement, p. 76.

[77] Potomac Statement, p. 3.

Proposal would change the definition of "unauthorized use" to include balancing charges outside of the ± 2% threshold.[78] Potomac complains that this change would be contrary to the plain meaning and the common usage of the term "unauthorized use" and would be inconsistent with its use in other parts of the KEDLI tariff, where it is always used to describe consumption that occurs after the gas customer has been instructed to stop or reduce consumption.[79]

Contrary to Potomac's claim, the proposed tariff changes are intended to clarify that balancing outside of the ±2% threshold is a penalty for the unauthorized use of gas, for which the NYISO tariff does not allow the generator recovery of charges. Under the current NYISO tariffs the generators are allowed to recover in their bids gas balancing charges, but not unauthorized gas usage or penalty charges. Thus, the proposed language in Section VI.9.1 matches the language used in the NYISO tariff.

The motivation behind this proposal is to neutralize any economic incentive for generators that could adversely impact the reliability of the gas system. The proposed revisions will help ensure that Market Parties in NYISO cannot work an end-run around KEDLI charges, which are penalties under KEDLI's tariff, and not additional charges for services. In addition, the Federal Energy Regulatory Commission (FERC) does not distinguish between unauthorized natural gas and penalty natural gas, so it could be argued that the addition of the word "penalty" to the KEDLI tariff describing unauthorized gas usage is redundant. Staff believes that the language is clarifying and not redundant. In any event, Potomac should also understand that there are situations outside of an Operational Flow Order (OFO) that can jeopardize the reliability of a natural gas delivery system. Use of gas by any large volume transportation customer, such as a power

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[78] The tariff modifications recommended in Section VI.9.1 of the Joint Proposal would apply to both KEDNY and KEDLI; however, in its Statement, Potomac only referred to KEDLI, and so we confine our response to KEDLI as well.

[79] Potomac Statement, p. 3.

generator, without the gas arriving to the utility's distribution system for delivery, can actually create an OFO situation where one did not exist and otherwise need not exist.

3.2. The proposed definition is not designed or intended to influence wholesale electric rates.

Potomac claims that Section VI.9.1 of the Joint Proposal proposes to define consumption as unauthorized for the specific purpose of setting the terms of sale of wholesale electricity.[80] It states: "[balancing charges] will be considered penalties (as such term is used in the New York Independent System Operator tariff with respect to unauthorized use of gas)." Potomac further states that this provision does not appear to affect the treatment of the generator under the KEDLI tariff, but the provision would affect its treatment under Section 23.3.1.4.6.2.1 of the NYISO Market Services Tariff, which states: "the ISO shall not permit charges for unauthorized natural gas use to be included as a component in the development of a Generator's reference levels and Market Parties shall not be eligible to recover costs associated with unauthorized natural gas use." Thus, Potomac jumps to the conclusion that the sole effect of the proposed tariff amendments in Section VI.9.1 of the Joint Proposal would be to influence electric rates that are FERC's jurisdiction.

Potomac's conclusion is not only wrong, it ignores a FERC Order of which it should be well aware. In a February 18, 2016 Order, FERC agreed that the NYISO's definition of "unauthorized gas use" excludes from generator reference levels *only* those balancing charges that are explicitly identified under an interstate natural gas pipeline's or local distribution companies' (LDC) tariff as *unauthorized* natural gas use or penalty natural gas for the purposes of maintaining the reliability and integrity of the natural gas delivery system.[81] It did not interpret this provision to exclude from generator reference levels the majority of balancing

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[80] Potomac Statement, p. 4.

[81] FERC Docket Nos. ER16-168-000 and ER16-168-001, Order Accepting Proposed Tariff Revisions Subject to Condition, ¶ 43, issued February 18, 2016.

charges that a generator may accrue for minor deviation in natural gas takes, but such determination must be made by NYISO in its evaluation of a generator's reference level. Also, a generator can obtain clarification from the relevant interstate natural gas pipeline or LDC if that entity's tariff is unclear as to what constitutes unauthorized natural gas or penalty natural gas.[82] In addition, FERC indicated that the risk of cost exposure when real-time dispatch varies from day-ahead schedules is mitigated by Services Tariff provisions that permit Market Parties to submit up-to-date fuel type and fuel price information for their generators with their real-time market bids and their day-ahead market bids.[83]

3.3. The proposed provision will not tend to increase deviations from the delivered quantity.

Potomac claims that the tariff amendments proposed in Section VI.9.1 of the Joint Proposal will increase deviations because the generators do not incorporate balancing penalties and other financial charges in their offers. Because the NYISO responds to variations in electricity demand by dispatching-up or down the generators in order of their costs, generators ordinarily reduce the likelihood of being dispatched-up by raising their offer price and reduce their likelihood of being dispatched-down by lowering their offer price.[84]

Currently, gas utilities sell interruptible service to generators. That service includes balancing services within a limited dead band. Generators are required to consume within a certain band of nominations (± 2%) and there are additional charges if they deviate to an extent greater than ± 2%. If they consume more gas than the tolerance band allows, they are charged a premium over the cost. On the other hand, if they consume less gas, they are paid less than the cost of that gas. Staff believes that if the charges for deviations greater than ± 2% (penalty levels) are simply a pass through to generators-- they would not affect generator

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82 Id.

83 Id.

84 Potomac Statement, p. 5.

behavior and the generators would not curtail usage when the gas system is under stress. The 'penalty' bands are meant to discourage generators from straying beyond the balancing service provided within the ± 2% band. The examples provided by Potomac refer to an impact on electric prices and have nothing to do with the tariff amendments proposed in Section VI.9.1 which clarify what unauthorized gas use is and what charges should be considered penalties, and are intended to preserve the reliability of the natural gas system.[85]

3.4. The proposed provision would not lead to large increases in costs to consumers.

Potomac says that the amendments proposed in Section VI.9.1 are unreasonable because gas consumption outside the band is not 'unauthorized' per se according to what it says is the strict meaning of the word. Potomac states, without any evidence supporting it, that while the tariff amendments are intended to influence wholesale rates that are under FERC's jurisdiction, the amendments will actually increase electric costs paid by consumers (as higher cost units would be dispatched, when the low cost gas generator does not bid as he may not be able to recover penalties) and the provision may lead to exceeding the over or under delivery of gas and defeat the underlying purpose of the provision.[86]

New York LDCs provided comments to FERC regarding the NYISO Services Tariff revisions at issue here and approved by FERC in its February 18, 2016 Order.[87] The LDCs supported NYISO's proposed tariff revisions regarding unauthorized use of gas and penalty charges as they would eliminate the unintended incentive for generators to use natural gas in circumstances when such usage is harmful to, and could inadvertently jeopardize, the reliability of the natural gas system; FERC agreed with the LDC's argument.[88]

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85 Id. at 5-6.

86 Id. at 6-7.

87 FERC Docket Nos. ER16-168-000 and ER16-168-001, supra, ¶18.

88 Id. at ¶39.

In this same order, FERC discusses the NYISO's explanation of the role of an MMU such as Potomac.[89] NYISO explained that as part of an MMU's regular review of market outcomes, the MMU is supposed to identify instances where a generator, if scheduled, would likely have had a significant impact on clearing prices. FERC states that NYISO affirmed that MMU has always assumed that a competitive gas-fired generator would not choose to violate applicable tariffs or other agreements with natural gas pipelines or LDCs by consuming unauthorized natural gas, and, therefore, has always excluded gas-only generators that likely did not have fuel available after the day-ahead market from the list of potential instances of physical withholding. If the MMU's screening process identifies a generator whose operation raises potential anticompetitive concerns, NYISO continues, MMU (alone or in collaboration with NYISO's MMA) will contact the generator for an explanation. Corrective action for generators identified through this process should be Potomac's concern, not what the local utility identifies as unauthorized use of gas, nor retail rates charged by gas utilities.

In light of the above, the Commission should reject the Statement in opposition filed by Potomac and adopt the tariff amendments proposed in Section VI.9.1 of the Joint Proposal.

4. Response to the Issues Raised by Brookhaven

Brookhaven raised three issues. Brookhaven's concern regarding SIR costs is addressed above in section 1.2. Brookhaven's opposition to the proposed rate design is addressed above in Section 1.5. Brookhaven's opposition to allowing the Companies to recover the full costs of the infrastructure required to operate their systems is addressed below.

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[89] Id. at ¶32.

4.1. The Joint Proposal recommends just and reasonable rates that allow the Companies' to recover the costs of providing safe and adequate service as required by the Public Service Law.

Brookhaven asks that "more of the costs of demand related infrastructure be borne by the Company" as opposed to ratepayers. Brookhaven's proposal should be rejected for two reasons. First, Public Service Law §65(1) requires the Commission to set just and reasonable rates that allow the Companies' to provide safe and adequate service. The costs of the infrastructure that the Companies prudently install are a cost of providing safe and adequate service, and therefore justly recoverable in rates. That the infrastructure is "demand-related" is of no moment. Second, shareholders commit capital to install infrastructure. The U.S. Constitution prohibits the taking of that capital without just compensation. To require the Company to fund prudent infrastructure investments and not allow the return of or return on the capital so used would violate the fifth and fourteenth amendments to the U.S. Constitution.[90] Accordingly, Brookhaven's proposal should be rejected.

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[90] Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.").

CONCLUSION

The terms of the Joint Proposal entered into in this case fully satisfy the Commission's Settlement Guidelines. The issues raised by PULP, URAC and Potomac in opposition to the Joint Proposal do not justify rejecting or modifying the terms of the Joint Proposal. For all of the reasons put forth in Staff's Statement in Support of the Joint Proposal and in this Reply, Staff respectfully recommends that the terms of the Joint Proposal be found to be in the public interest and adopted by the Commission in their entirety.

Respectfully submitted,

/s/
Brandon F. Goodrich
Steven J. Kramer
Nicholas Forst
Staff Counsels

Dated: September 23, 2016
Albany, New York