

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

- CASE 15-M-0127 - In the Matter of Eligibility Criteria for Energy Service Companies.
- CASE 12-M-0476 - Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State.
- CASE 98-M-1343 - In the Matter of Retail Access Business Rules.

RULING ON MOTIONS TO STRIKE

(Issued January 19, 2018)

ERIKA BERGEN AND ASHLEY MORENO, Administrative Law Judges:

By ruling dated December 13, 2017, we established the deadlines of December 18, 2017 for parties to file motions to strike testimony and December 21, 2017 for parties to file replies to those motions. Motions to strike were filed by: Constellation Energy Gas Choice, LLC (Constellation); Direct Energy Services, LLC (Direct Energy); Retail Energy Supply Association (RESA); the City of New York (City); the Utility Intervention Unit of the New York State Department of State and the Attorney General of the State of New York (collectively UIU/NYAG); and Staff of the Department of Public Service (Staff).

Motions of the City, UIU/NYAG and Staff to strike testimony by Frank Lacey

By their motions, the City, UIU/NYAG and Staff seek to strike portions of the pre-filed rebuttal testimony of Frank

Lacey, a witness for RESA.<sup>1</sup> The portions of Mr. Lacey's testimony identified by these parties refer and respond to the pre-filed testimony of John Haff, a witness for the New York State Office of General Services (OGS), which was not offered or accepted into the evidentiary record in this case. According to the City, because Mr. Haff's testimony was not entered into the record, the testimony of Mr. Lacey purporting to rebut Mr. Haff's testimony serves no purpose and does not contribute to the development of a record upon which the Commission should rely.

Staff adds that the portions of Mr. Lacey's rebuttal testimony that refer to Mr. Haff's testimony are, in any event, improper because rebuttal testimony must challenge another party's testimony and, here, Mr. Lacey simply agrees with Mr. Haff's testimony.

In opposition to these motions, RESA asserts that there is no regulation that limits the type of source material on which an expert may rely in formulating his or her expert opinion and, thus, Mr. Lacey may rely on materials that exist outside the record in presenting his expert testimony in these proceedings. RESA argues that, even though Mr. Haff's testimony is not in the evidentiary record, this fact does not preclude Mr. Lacey from referring to or relying upon it in preparing his own testimony.

We grant the motions to strike portions of Mr. Lacey's rebuttal testimony. Testimony that is pre-filed is not automatically made part of the evidentiary record in a

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<sup>1</sup> The City and UIU/NYAG seek to strike: page 4, lines 12-13; page 12, line 8 through page 17, line 2; page 43, the part of footnote 43 that begins with, "As discussed by Mr. Haff..." through the end of the footnote; and page 100, lines 16-20. Staff seeks to additionally strike page 8, line 4 through page 9, line 7.

proceeding. Rather, the Commission's regulations state that pre-filed testimony will be received into the evidentiary record only if "each of the witnesses [who provided pre-filed testimony] is present at the hearing at which his or her prepared written testimony is offered and adopts that testimony under oath." (16 NYCRR 4.5(b)(2)). Here, Mr. Haff did not appear at the hearing and OGS did not offer the testimony for entry into the record. Nor did any other party successfully offer Mr. Haff's testimony into the record.

While we agree with RESA's position that experts offering testimony in Commission proceedings are permitted to rely upon extra-record data and materials when forming their expert opinions, RESA's argument in this regard is slightly misplaced, given that the testimony at issue is rebuttal testimony, not direct. While direct testimony is a party's opportunity to lay bare its arguments and offer evidence to support them, rebuttal testimony serves a specific purpose - to rebut or challenge the direct testimony offered by other parties in the case.

Here, because Mr. Haff's direct testimony is not part of the evidentiary record in these proceedings, there is no basis for any party's witnesses to challenge or otherwise refer to Mr. Haff's testimony in their rebuttal testimony. Further, as Staff argues, rebuttal testimony must actually rebut or challenge the testimony offered by another party and, here, Mr. Lacey refers to Mr. Haff's testimony solely to note his agreement with Mr. Haff's positions. Thus, even assuming that Mr. Haff's testimony were included in the record, the portions of Mr. Lacey's testimony that refer to it would be stricken as improper rebuttal. Accordingly, we grant the motions of the City, UIU/NYAG and Staff to strike the portions of Mr. Lacey's rebuttal testimony identified by these parties.

Motion of Constellation to strike testimony by Barbara Alexander

Constellation seeks to strike page 7, line 19, through page 8, line 8, of the pre-filed rebuttal testimony of Barbara Alexander, a witness for the Public Utility Law Project of New York, Inc. (PULP). According to Constellation, this portion of Ms. Alexander's testimony "does not counter, disprove or contradict" any other party's direct testimony and, instead, refers to Ms. Alexander's own direct testimony. Constellation argues that this portion of Ms. Alexander's rebuttal testimony is, therefore, improper.<sup>2</sup>

We deny Constellation's motion to strike the cited portion of Ms. Alexander's rebuttal testimony. In the identified testimony, Ms. Alexander observes that energy service company (ESCO) witnesses did not "acknowledge" that ESCOs use "negative option renewal terms" when converting fixed price contracts to variable price contracts when a customer does not respond to a renewal notice. She then states that she discussed the practice in her own direct testimony.

Reading Ms. Alexander's testimony in context, it appears that she is providing rebuttal to the testimonies offered by witnesses for RESA, Direct Energy, and National Energy Marketers Association (NEMA) regarding the purported "value of the products and services actually offered by ESCOs in the current market."<sup>3</sup> Ms. Alexander opines that the ESCO witnesses did not provide evidence or facts to support their contentions that ESCO products offer program and product options that provide value and benefits to consumers that are not

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<sup>2</sup> PULP did not respond to Constellation's motion in writing and did not offer any response to the motion on the record at the hearing when Constellation raised its objection to Ms. Alexander's rebuttal testimony.

<sup>3</sup> Alexander Rebuttal, p 3.

available from utilities. Her statement regarding the negative option renewal terms is a fair comment on what she believes is a shortcoming of the ESCO witnesses' testimony. As such, it falls within the bounds of permissible rebuttal testimony. Therefore, we deny Constellation's motion to strike.

Motion of RESA to strike testimony of Gerald Norlander

By its motion, RESA seeks to strike portions of the direct testimony of PULP witness Gerald Norlander on the basis that the testimony provides legal opinions and conclusions.<sup>4</sup> Legal opinions and conclusions, RESA avers, are outside the scope of permissible testimony because they interfere with the ALJs' duty to interpret the law. RESA contends that providing legal conclusions as part of expert testimony is not appropriate and maintains that PULP could properly provide its opinion on these issues in its post-hearing brief. RESA maintains that the other parties, including Staff, reserved legal arguments and opinion for briefs. When RESA's objection was raised at the evidentiary hearing, NEMA, Direct Energy and Constellation joined in RESA's motion. Constellation submitted a letter supporting RESA's motion.

At the hearing, PULP argued that Mr. Norlander's testimony was appropriate. PULP stated that the December 2, 2016 Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits established a list of 20 questions for the parties to answer in the context of the proceeding and Mr. Norlander's testimony provides responses to those questions. PULP further contended that the Commission would not have included those questions in its Notice for the

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<sup>4</sup> RESA seeks to strike: page 8, lines 21-29; page 9, lines 1-25; page 10, lines 1-8; page 11, lines 2-21; page 15, line 5 through page 29, line 7; page 29, line 17 through page 31, line 7; page 32, lines 4-6; and page 33, line 26 through page 35, line 15.

parties to answer if it had believed it would usurp the administrative law judges' ability to analyze the legal arguments presented in the proceedings. Finally, PULP asserted that, given the quasi-legislative nature of the proceedings, the rules of evidence are inapplicable and greater latitude should be given where it may inform the record. Mr. Norlander's testimony, PULP maintained, would do just that.

Generally, testimony of an expert witness that provides legal interpretation and opinion should be excluded from the evidentiary record. While we agree that Mr. Norlander is qualified by his education and experience to opine on the legal issues included in his testimony, we find that legal arguments are most appropriately considered by us as presented by the parties in brief. Therefore, we will strike the portions of Mr. Norlander's testimony that we find are legal argument and opinion.

We find that some of the portions of testimony identified by RESA are not legal opinions and conclusions, but rather are policy arguments that, in some instances, were raised by other parties to these proceedings and are properly presented in testimony. We grant the motion to strike, limited to the following sections: page 8, line 21 through page 10, line 8; page 11, line 2 through line 21; page 18, line 7 through page 22, line 12; page 23, line 3 through page 26, line 16; page 26, line 25 through page 29, line 7; page 30, line 5 through page 31, line 7; page 32, line 4 through line 6; page 33, line 26 through 13; page 34, line 19 (beginning at "Authority") through line 21; page 34, line 28 (beginning at "The Commission") through page 35, line 15. The remainder of the request is denied.

Motion of Direct Energy to strike testimony of the Staff  
Economics Panel

Direct Energy seeks to strike page 12, line 13, through page 13, line 23, of the pre-filed rebuttal testimony of the Staff Economics Panel, along with the exhibit proffered by the Panel (Exhibit 726, pre-filed designation SEP-1), on the basis that the testimony is improper because it does not respond or challenge another party's direct testimony. According to Direct Energy, the testimony instead improperly supplements the Staff Economics Panel's direct testimony.

In opposition to the motion, Staff contends that the testimony cited by Direct Energy is proper rebuttal in that it challenges the direct testimony of Direct Energy witness Mr. Sharfman and RESA witness Dr. Makholm, both of whom opined that customers who actively shop can save money by using an ESCO over the default utility. Staff asserts that the testimony and SEP-1 show that, contrary to what could be expected if Mr. Sharfman and Dr. Makholm were correct, utilities' market share of customers is increasing, not decreasing.

The challenged testimony and exhibit offer the Panel's opinion, with data that purports to support the opinion, that customers are not migrating from utilities to ESCOs and, apparently, are migrating from ESCOs back to utilities. The Panel asserts that this data refutes the ESCO witnesses' testimony regarding "active shoppers" and savings that may be achieved as a result. Because this testimony and exhibit constitute appropriate rebuttal, we deny Direct Energy's motion to strike.

Motion of RESA to strike testimony of UIU/NYAG Panel

RESA seeks to strike portions of the rebuttal testimony of the UIU/NYAG Panel on the basis that the testimony is not permissible rebuttal because it only repeats or endorses testimony already in the record.<sup>5</sup> According to RESA, the testimony it identifies either offers improper support for the position of a friendly party or restates testimony in the record. RESA states that it makes its motion only conditionally, that is, only in the event that we find that rebuttal testimony shall be limited to testimony that disproves or contradicts the opposition's evidence or argument. In making such statement, RESA notes our November 20, 2017 Ruling on Direct Energy's Motion to Strike Certain Rebuttal Testimony Submitted by Staff, where we stated our agreement with a ruling of our colleague, Administrative Law Judge Lecakes, that, by definition, rebuttal testimony must "counter, disprove or contradict the opposition's evidence or a presumption, or ... argument."<sup>6</sup> RESA urges that we apply a more expansive view of the scope of rebuttal testimony, suggesting that rebuttal testimony could include supporting and contrasting views of other witnesses. Constellation filed a letter supporting RESA's motion.

UIU/NYAG dispute RESA's characterization of their rebuttal testimony and assert that each portion of challenged testimony serves as proper rebuttal. According to UIU/NYAG, the testimony concisely summarizes the testimony to which the UIU/NYAG Panel is responding and either recommends modifications

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<sup>5</sup> RESA seeks to strike: page 4, lines 8-11; page 4, lines 14-16; page 4, n. 2; page 6, line 18 through page 7, line 2; page 7, lines 16-17; page 10, lines 7-12; page 20, lines 14-20; page 25, lines 7-11; and page 25, n. 40.

<sup>6</sup> Case 16-G-0257, National Fuel Gas Distribution Corp. - Rates, Ruling on Motion to Strike (October 3, 2016), p. 4.

to another party's proposal or further explains UIU/NYAG's opposition to another party's position, both permissible in the context of rebuttal testimony.

We find that the identified portions of testimony are proper rebuttal. The sections of testimony, as UIU/NYAG identified, are providing a foundation for or are distinguishing UIU/NYAG's positions from that of other parties, and are appropriate to include in the context of rebuttal testimony. For example, while UIU/NYAG refer to the testimony of other parties, namely Staff, in making some of their arguments, the references are made in passing when introducing their own positions on the issues or are those that UIU/NYAG have adopted with modifications. Thus, the descriptions of those positions are provided to distinguish UIU/NYAG's perspectives from that of other parties, here, NEMA and RESA witnesses. Consequently, we deny RESA's motion.

Motion of Staff to strike portions of various witnesses' testimony

Staff seeks to strike portions of testimony offered by John Morris, on behalf of Direct Energy, Ronald Lukas, on behalf of Great Eastern Energy (GEE), and the rebuttal testimony of the Impacted ESCO Coalition (IEC) Panel.<sup>7</sup> According to Staff, each portion of rebuttal testimony it identifies is improper in that the rebuttal does not challenge the position taken by another party.

In opposition to the motion, Direct Energy first notes that Staff did not raise any objection to the introduction of

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<sup>7</sup> Specifically, Staff seeks to strike page 4, line 7 through page 8, line 2 of Dr. Morris's rebuttal testimony; page 8, lines 21-22, page 9, lines 9-10 and 11-13, page 10, lines 1-5 of Mr. Lukas's rebuttal; and page I-7, line 33 through page I-8, line 10, page III-17, lines 5 through 14, and page IV-32, lines 6-7 of the IEC Panel rebuttal.

Dr. Morris's rebuttal testimony into the record at the hearing and, therefore, the current objection is untimely. However, according to our clarification at the hearing on December 1, 2017, because there was some confusion regarding the process for raising objections and/or motions during the hearing, we allowed parties to raise post-hearing objections with respect to testimony presented by witnesses on November 29, November 30 and December 1, even if no objection was raised at the hearing. Staff specifically stated that it had objections to certain testimony of witnesses who had testified on those three days. Accordingly, we will accept Staff's motion with respect to Dr. Morris's testimony, which was presented on November 30, 2017, as timely filed.

Nevertheless, we agree with Direct Energy that the portion of Dr. Morris's rebuttal testimony that is subject to Staff's motion is proper rebuttal and therefore deny that part of Staff's motion to strike. While it is true that, in the specific lines identified by Staff, Dr. Morris does not directly refute any other party's testimony, he is appropriately laying a foundation for his opinions and, generally, responds to claims made by Staff witness Joel Andruski.

With respect to Mr. Lukas's rebuttal testimony, we agree with GEE that, in the portions of testimony identified by Staff, Mr. Lukas was generally refuting testimony presented by Staff witnesses. In stating that Staff witnesses did not address certain issues, Mr. Lukas identifies perceived shortcomings in those witnesses' testimony. Inasmuch as this is an appropriate use of rebuttal testimony, we deny this part of Staff's motion to strike.

Finally, we deny as untimely that part of Staff's motion that seeks to strike certain testimony presented by the IEC Panel. As explained above, we clarified at the hearing on

December 1, 2017 that, moving forward, we would require parties to raise objections to testimony at the time the testimony was offered. The IEC Panel was presented for cross examination on December 12, 2017, the last day of the hearing, and Staff raised no objection to any aspect of the Panel's testimony. Consequently, the part of Staff's motion that seeks to strike portions of the IEC Panel's testimony is untimely and must be rejected.<sup>8</sup>

(Signed)

ERIKA BERGEN

(Signed)

ASHLEY MORENO

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<sup>8</sup> In any event, even if the motion were accepted, we nevertheless would deny the motion, inasmuch as the IEC Panel's testimony generally identifies points of disagreement with other parties' testimony and, incidentally, refers to certain parties' testimony that supports their position. Read as a whole, this rebuttal testimony is not improper.