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.

ANSWER IN OPPOSITION TO ORU MOTION TO STRIKE IMPROPER DIRECT TESTIMONY

I. O&R misleads the parties by intimating nothing to do with the AMI program including smart meters has any relevance to the current Rate Hearing due to its having been the subject of a previous rate hearing and the rollout having been approved (without a hearing at another proceeding; O&R also misleads the parties about Secretary Burgess' signed November 16, 2017 order which explicitly states that costs associated with the project approved in this order are subject for review in this proceeding.

Between the last rate hearing and the current hearing, Orange and Rockland Utilities, Inc. ("O&R") petitioned in case # 17-M-0178 (not a rate hearing) to have the smart meter program rolled out past the initial pilot in Rockland County to Orange and Sullivan Counties and to the rest of Rockland County. The original 11/16/2017 order in17-M-0178 signed by Secretary Burgess states

> Further, to ensure that the benefits of AMI deployment materialize, we are implementing a cap on the capital expenditures associated with the AMI project. The capital expenditures will be capped at the Company's estimated AMI project cost of $98.5 million. *In addition, all costs associated with this project are subject to further review in O&R's next base rate proceeding.*
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> (Emphasis Added)

18-E-0067/18-G-0068 is the "next base rate proceeding"; ergo, questions of costs associated with the Advance Metering Infrastructure "AMI" project, which include smart metering, are subject to further review in this proceeding by the very command of this order. Ergo my testimony, which includes discussion of lack of proof as to costs savings to ratepayers and energy savings to the utility is absolutely relevant, discusses cost implications of studies and evidence from the field

demonstrating malfunctioning meters, costs from accounting charges, costs to the public's health and privacy is wholly relevant and should not be struck. There is nothing that mandates the intervenors in this case to approve further charges, including but not limited to accounting charges, for the AMI program absent certain modifications, clarifications or other changes. The order contemplated that the intervenors would review the costs of this program. A review of costs does not mean a review and an automatic rubber stamp; a review suggests that if the costs are not as claimed, they should be changed or not approved to be passed along to the ratepayer. Even if the DPS would construe that such an order does involve a rubber stamping of expenses, the fact that they are be reviewed in this proceeding means that the intervenors are expected to discuss the costs. Costs include, but are not limited to externalities, including health, interference with other equipment permissioned at or near the same frequencies, privacy costs including the risk of stolen data; financial costs include health and include the costs of rolling out the meters and maintaining them when no facts exist that show that this scheme saves money or power. My testimony discusses costs; O&R has demonstrated no reason to strike it.

The review contemplated by the order in *this base rate proceeding* should involve careful analysis about this technical boondoggle that I assert does not perform as claimed and does not cost what O&R claims it costs. The following issues which should be vetted by the intervenors involve a review of costs: whether this project siphons money away from projects that promote real and actual economic and energy efficiencies and whether this project does create a fire and explosion risk and whether it does significantly exacerbate an extant public health problem and whether it creases civil rights violations for a statistically significant portion of the population that the cities of Philadelphia and Boston noted in their filing to the FCC in Docket #13-12 noted in explaining that transmitter rollouts create reduced building accessibility for people who are imminently sensitized to the radiofrequency radiation, a known neurotoxin and World Health

Organization-designated Group 2b carcinogen emitted by smart meters and whether smart meters run contrary to the recommendations of the 2005 Indoor Environmental Quality ("IEQ") report of the National Institute of Building Sciences ("NIBS") and the United States Access Board ("the Access Board").

O&R is treating Secretary Burgess' order from 17-M-0178 like an a la carte menu. "I'll comply with the appetizer and the dessert, but I'll skip the protein and the vegetables." O&R's version is, "We would like to comply with the part about being permissioned to roll out the smart meters, but we'd prefer not to comply with the part of the order saying, "*all costs associated with this project are subject to further review in O&R's next base rate proceeding."* Said another way, O&R's position is "don't shine a light on something we prefer to be left unexamined that was contemplated for examination by Order of the Commission and strike testimony that addresses something related to something that is supposed to be reviewed in this proceeding".

Intervenors should be made aware of facts surrounding smart metering, including, but not limited to facts that have become evident since the initial rate hearing and since case 17-M-0178 in studies and documentation from the field. According to the testimony of O&R, the AMI program will cost $75m over 20 years. Of the $20.3 million in rate relief being requested for electric service and the $4.5 million for gas service requested for the rate year; $6 million in depreciation charges and $15m in other expenses including amortizations of outmoded assets (e.g. the existing meters that the so-called smart meters would replace) are slated for recovery. Serious questions need to be asked about O&R junking safe analog meters, replacing them with 1-way AMI's and now junking those for unproven smart meters merely a few years later. I say unproven, because the business plan put forth does not prove these so called savings and benefits and evidence from other hearings in other states suggests they do not exist. At the rate at which this technology is being rendered obsolete, the costs of the AMI project require even more

careful vetting; more accounting and other charges will need to be taken that O&R is not publicly accounting for when it is decided in a few years to swap out the technology again as these meters become outmoded like the last set rolled out a few years ago.

I assert that 17-M-0178 legally *should* have been a rate hearing, which would have involved a mandatory public hearing upon notice to the public and concomitant evidentiary hearing at which questions should have been asked about what the Pilot program proved. Vigorous public cross-examination of O&R/ConEd executives and DPS staff would have shown that there is no evidence to back up statements about the AMI program and business plan. Instead, the further rollout was approved in 17-M-0178 without answering these questions that I also assert involve known and unknown charges that were not actually approved by the DPS in a prior rate hearing (see section II below); it is not too late, especially given the order in 17-M-0178 now to get answers to these questions in this proceeding. The intervenors can decide not to fund certain charges in the absence of negotiated changes to the AMI program after they understand the full ramifications of this program and the information that has been withheld to the public and not properly vetted. The intervenors can also choose to do nothing, but they shouldn't abrogate their responsibility under the order which contemplated review of AMI costs at this rate hearing. The intervenors could decide in their review of the costs associated with program to insist that costs be put aside for lawsuits, the intervenors could decide that O&R needs to make analog meters available on demand as its neighbor to the North, New York State Electric and Gas ("NYSEG") does to avoid future lawsuits and to protect those most vulnerable to the microwave radiation emissions from these meters, those who have any medical condition identified by the American Academy of Environmental Medicine ("AAEM") that would benefit from a smart-meter opt out[1]

[1] American Academy of Environmental Medicine (AAEM) EMF Position Statement https://aaemonline.org/pdf/emfpositionstatement.pdf

and those concerned about maintaining a clean electromagnetic environment in their homes for the maintenance of both their health and their electrical equipment. The intervenors could decide, for instance that O&R should heed the advice that former California Public Utilities Commission ("CPUC") Chair Michael R. Peevey gave to Pacific Gas and Electric ("PG&E") to allow people to keep analog meters prior to a state-wide mandate allowing analog opt-outs[2]. The intervenors might decide to further review the evidence on public health problems and fire and explosion risk created by the meters and the fact that there is no proof that they lower costs to the consumer (the reverse is true) or that they reduce electricity use-age. This evidence was apparently used by New Mexico's Public Service Commission's 2018 denial of the use of smart meters to its regulatory utilities. The intervenors could decide after discussing error rates of these meters in other jurisdictions that O&R has not properly budgeted for the program and start asking questions of why charges should be approved now on the basis of claims that there will not be more associated with the program.

The original rate case did not pre-pay for the rollout of the smart meter program, even if O&R and the DPS claim that these charges were pre-approved. This program is largely being paid for out of some of the proceedings requested in this rate case. But for the approval of the further rollout in 17-M-0178, these charges would not need to occur; 17-M-0178 itself should have been a rate hearing- not a "we'll approve it now, and pay for it later after it is a *fait accompli*" proposition and this issue is subject to further judicial review (see Point II). When the benefits of a boondoggle are in serious question and the harms have been documented, another

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American Academy of Environmental Medicine (AAEM) Medicine Recommendations Regarding Electromagnetic and Radiofrequency Radiation Exposure 7/12/12
http://www.scribd.com/doc/100080984/AAEM-EMF-RF-Medical-Conditions-Recommendations

[2] ftp://ftp2.cpuc.ca.gov/PG&E20150130ResponseToA1312012Ruling/2010/09/SB_GT&S_0000529.pdf
9/3/10 Email from Michael R. Peevey to Brian K Cherry RE: SF Chamber Statement on CPUC Independent Evaluation of PG&E Smart Meters

state just rejected a similar program as being contrary to the public interest and an order exists to review the costs of O&R's program at this rate-hearing, the time to discuss all aspects of this program are now; *any striking of my testimony would be tantamount to a gag order on the parties that could only be calculated to avoid a full review of costs of the AMI program that was contemplated by the November 16, 2017 Order of this Commission*. The word "costs" at a minimum means expenditures, it means charges, it means the costs of economic externalities. A review of costs also means a vetting of whether true costs have properly been budgeted, what happens to the depreciation schedule when the failure rate of the meters is actually higher (as has been proven higher in other states like Arizona) than O&R acknowledges and what the actual costs to consumers from technology that does not accurately measure the use-age of electricity and has not been proven to lower electricity consumption actually are.

II. O&R/ConEd misleads the parties by suggesting that the smart meter rollout and all its attendant charges were approved in a rate hearing. I have argued that they are not and contrary to O&R's insinuation, this issue has not been fully litigated. The questions of

- ***a) whether charges permissioned to be made pursuant to an order from a proceeding that was not a rate hearing were in fact actually pre-approved at a previous rate hearing, and if not whether the DPS abused its discretion by not turning the proceeding into a rate hearing before approving those charges***
- ***b) whether the charges that were not pre-approved at a rate hearing are sufficiently high to have statutorily required a public hearing held upon notice prior to approval and if they were not sufficiently high, whether the DPS abused its discretion by not holding such a hearing***
- ***c) whether the DPS erred in approving these specific charges ex post facto on the basis of the claims made by O&R and in light of existing research and data on smart meter performance, health and safety.***
- ***d) whether smart metering constitutes so-called "routine administration and management of the commission's functions" pursuant to 16 NYCRR §7.2***

are among the issues that are still justiciable and which relate to the instant rate hearing.

Again, O&R and Consolidated Edison Company of New York, Inc. ("ConEd") mislead the parties that the rollout of smart meters beyond the initial pilot in Rockland County was approved in a rate hearing. It was not. It was approved in a *separate* proceeding, 17-M-0178, that was *not* a rate hearing, which is a legally significant, albeit inconvenient fact for O&R/ConEd. This inconvenient fact is part and parcel of the gravamen of my petition for rehearing in 17-M-0178, the ruling from which is subject to review in Albany Supreme Court. All parties are on notice due to my testimony of my intention to file an Article 78 to seek redress on this matter. The issues contained therein have not been fully litigated, even though O&R attempts to make the intervenors think that it is a final ruling that cannot be reversed/modified/thrown out, etc:

> To date, according to the Commission's Document and Matter Management ("DMM") System, Ms. Kopald has not sought rehearing of the May 2018 Order.[3]

If the Article 78 proceeding is successful, any costs, including, but not limited to accounting charges passed along to the ratepayers in the instant rate hearing that relate to smart metering and that O&R now attempts to suggest were properly pre-approved in another rate hearing (and should not be the subject of review at this hearing notwithstanding the DPS' November 16, 2017 order) will be subject to another proceeding to vacate and the company will have to halt the rollout of the smart meters. This could ultimately lead to the removal of the installations made pursuant to the November 2017 and May 2018 Orders in 17-M-0178. Therefore the issues in my testimony are also relevant for consideration by the intervenors at this rate hearing inasmuch as we may need to reconvene in the future if this proceeding is ordered to be redone as a result of the Article 78.

Whatever the intervenors decide in the current proceedings, they must have all facts

[3] O&R engages in misdirection by suggesting to the intervenors that I should have sought a rehearing of a rehearing and suggests this issue should go into an endless loop of analysis with the DPS. The next logical stop is to go to Albany Supreme Court for a review of the DPS' decision-making, and not to keep going back to the DPS on the issue of the further rollout in the service territory.

about smart meters and their costs and all facts about the ongoing legal dispute as to whether the further rollout of AMI was properly permissioned before them for consideration for this time. The intervenors must have the tools at their disposal to ask critical questions about the program. *Alliance for Affordable Energy, Inc. v. Council of City of New Orleans*, 578 So.2d 949, 95 (La. Ct. App. 1991) is applicable here. The justices relied upon the following definition in their consideration of prudence: "whether the utility followed a course of conduct that a capably managed utility would have followed in light of existing and reasonably knowable circumstances." The justices further noted: . . . the prudence test "is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures." Thus, a utility must actually consider a range of alternatives and attempt to foresee knowable risks in order to obtain a determination of prudence. A review of costs for the AMI project can and should include an analysis of what was known by the DPS and O&R at the time of 17-M-0178. A hearing during that proceeding should have included an analysis of whether the Pilot demonstrated the so-called benefits touted in O&R's business plan instead of merely rubber-stamping a business plan whose model has been proven faulty by other jurisdictions which have had these meters for some time, including and especially the so-called demonstrated savings to the Consumer. That analysis can and should occur at this proceeding pursuant to the DPS' November 16, 2018 order. Even the DPS contemplated this review in its order.

Another issue that arose during the Rehearing of 17-M-0178 was the placement of a schematic diagram into the record by O&R that was supposed to demonstrate the company was not passing along the electric use charges to operate the meter to the Consumer directly (even if it is not doing this, O&R will be indirectly charged by passing along the charge via rate increases in this proceeding, but how this cost is being allocated needs to be determined); when I asked

Mr. Carley to provide an affidavit that this schematic actually demonstrated that the consumer wasn't being made to pay directly for this charge, he refused and said something along the lines of "the DPS knows what we are doing". It is a valid line of questioning for this proceeding if the DPS engineers believe this schematic demonstrates what O&R says (I could not find an engineer who could support this claim) and if in fact what O&R says is accurate.

Regardless of whether the DPS' not holding a public and evidentiary hearing prior to rolling out the smart meter program further in the district is ultimately deemed to be legal, it is entirely appropriate to probe this and other related questions about AMI costs that the DPS itself said should be reviewed in this very rate hearing. Testimony in this very proceeding refers to expenditures for the AMI program and related use of other microwave radiation technologies to effect same e.g.

> The fiber optic expansion project will allow the Company to look at alternate Radio Frequency ("RF") solutions, including the potential to leverage the existing RF infrastructure used for AMI. Access to expanded high-speed data facilities will become more achievable for multiple RF applications and devices 12 used for DSCADA, AMI, and security surveillance. Q. What is the expected project cost and in-service date? A. The Communications Expansion project will have various in15 service dates over the rate period. The Electric Plant 16 Additions proposed for this project is $928,300 in RY1 and 17 $904,000 in RY2. 18 Q. Are there any O&M requests associated with this program? 19 A. Yes."
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> Testimony Vol 1 page 619

Questions that should be asked about this include the costs of O&R getting around municipal telecommunications laws regarding placement of zoning equipment- whether they will be co-locating on existing infrastructure, etc. In the testimony, O&R also states:

> In addition, the Company's continuing efforts to implement advanced metering infrastructure ("AMI"), which involves the installation of smart meters in our customers homes and businesses, will enhance the customer experience by enabling the Company to provide electric and gas customers with timely feedback regarding their energy consumption. This information will empower customers to better manage their energy use, and by extension, their total bill.
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> Testimony Vol 1 page 3

As long as the DPS has directed a review of costs in these proceedings, in the absence of evidence provided in response to the pilot program, the intervenors may wish to consider the lack of evidence that shows that customers have better managed "their energy use, and by extension, their total bill" from O&R's program and find out what evidence O&R and the DPS have that this will occur. Under cross-examination in the New Mexico proceeding (15-00312-UT), the regulator and the utility were forced to admit that they had no proof for any such statement. None has been adduced in support of the furtherance of the rollout of the AMI program in O&R's service territory. Since costs include costs to consumers, this should be reviewed in this proceeding pursuant to the November 16, 2018 court order.

Also, after I raised the issue of fire and explosion risk in my petition for rehearing, a couple of weeks later articles came out in the local press about fires caused by the smart meters in Rockland County (this was not deemed to be a pressing enough issue for the DPS to consider my reply to O&R). Testimony in the New Mexico proceeding from EFI Global directly links defective switches in the meters themselves to the fires and suggests more is at play than mere installation error, which O&R publicly claimed after the press reported on these problems in Rockland. These costs to O&R of the fires that did occur can and should be discussed in this rate hearing. A full accounting of all testimony showing each and every part of the AMI program that O&R is asking to be recovered in these proceedings is not necessary; they are asking for costs of this program to be passed along to the ratepayer; this is not a foregone conclusion and it must be vetted by the intervenors and approved by the Judges.

Conclusion

The DPS November 16, 2018 order specifically contemplates a review of costs for the AMI program in this proceeding. O&R would like a gag order on any inconvenient information about the overall cost of the smart meter program. O&R would like the matter of what is reflected in

its business plan and accounting statements be deemed the absolute truth by fiat. O&R's wish and the DPS' clear command are incompatible. Even if this were not the case, given the on-going controversy about whether the smart meter rollout should have been further permissioned at this time, the intervenors should have all of the information related to that ongoing and concurrent issue whilst contemplating O&R's claims to the Commission that are related to smart meters. There is nothing that obligates the intervenors to rubber-stamp certain decisions and pass along costs to ratepayers that they deem contrary to the public interest. There is also nothing obligating the intervenors to pass along costs related to the AMI program to the ratepayers if they deem they do not benefit the ratepayers (and hence should be passed along to the investors). Therefore, I respectfully ask that O&R's motion be denied in its entirety and that these proceedings allow a proper review of costs as previously ordered by the Commission.

Respectfully Submitted,

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