

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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

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

RULING DENYING APPLICATION FOR ISSUANCE OF SUBPOENA DUCES TECUM

(Issued November 1, 2018)

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

INTRODUCTION

In these rate proceedings filed by Orange and Rockland Utilities, Inc. (O&R), intervenor Deborah Kopald has filed an application for issuance of an administrative subpoena duces tecum to Aclara Meters, LLC, Aclara Smart Grid Solutions, LLC and Aclara Technologies, LLC (collectively, the Aclara Companies). For the reasons detailed below, we deny the application and decline to issue the subpoena.

BACKGROUND

In our September 10, 2018 ruling denying O&R's motion to strike Ms. Kopald's testimony, we found that most of the issues raised in the testimony relating to O&R's Advanced Metering Infrastructure (AMI) program are not proper in these rate proceedings because they do not deal with the incorporation

of AMI costs into rates.<sup>1</sup> We determined that the issues that may be raised in these rate proceedings “are limited to the ratemaking mechanics of incorporating the AMI expenditures into rates, albeit with the opportunity to review the expenditures for their reasonable conformance with the prior Commission approval in the AMI Expansion Order.”<sup>2</sup>

We identified in that ruling the issues that are beyond the scope of these proceedings because they do not relate to ratemaking or have already been decided by the Commission in (1) its 2015 order establishing rates and initially approving O&R’s AMI program (2015 Rate Order),<sup>3</sup> (2) its 2017 order enhancing and expanding the AMI program (AMI Expansion Order),<sup>4</sup> (3) its 2018 order denying Ms. Kopald’s rehearing petition on the AMI Expansion Order (Rehearing Order),<sup>5</sup> and/or (4) its 2017

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<sup>1</sup> Ruling Denying O&R Motion to Strike Testimony (issued September 10, 2018).

<sup>2</sup> Id., p. 27.

<sup>3</sup> Cases 14-E-0493 and 14-G-0494, Orange and Rockland Utilities - Gas and Electric - Rates, Order Adopting Terms of Joint Proposal and Establishing Rate Plan (2015 Rate Order) (issued October 16, 2015). In its Order, the Commission adopted a Joint Proposal, which established rates and authorized AMI deployment in part of O&R’s Rockland County service territory, capping expenditures for deployment at \$28.1 million.

<sup>4</sup> Case 17-M-0178, Petition of Orange and Rockland Utilities, Inc. for Authorization of a Program Advancement Proposal, Order Granting Petition in Part (AMI Expansion Order) (issued November 16, 2017). The AMI Expansion Order granted O&R’s petition to enhance and expand the AMI program into O&R’s entire service territory and set a \$98.1 million cap on expenditures, recovery of which was expressly stated to be considered in the next rate proceedings.

<sup>5</sup> Case 17-M-0178, supra, n. 4, Order Denying Rehearing (issued May 21, 2017). The Commission denied rehearing and, on the merits, rejected Ms. Kopald’s claims challenging the health and safety, functionality, cost/benefits, privacy, security, and other purported defects about smart meters and the AMI program.

order approving the specific smart meters O&R is now using in its AMI program.<sup>6</sup> We specifically found the issue of smart meter functionality to be beyond the scope of these proceedings.<sup>7</sup>

Despite our denial of the motion to strike Ms. Kopald's testimony and our exercise of discretion to retain it in the record, Ms. Kopald appealed our September 10, 2018 ruling and challenged our determination regarding the issues that may be raised in these rate proceedings.<sup>8</sup> The Commission has yet to act on that appeal.

In the discovery phase of these proceedings, Ms. Kopald served a total of 101 information requests directed to O&R and Staff of the Department of Public Service (DPS Staff), which relate almost exclusively to O&R's AMI program and the digital "smart meters" being deployed in its service territory as part of that program. In August and September 2018, Ms.

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<sup>6</sup> Cases 16-E-0242 and 16-E-0366, Aclara Technologies - Meter Approvals, Orders Approving Aclara I-210+C Residential Electric Meter with Silver Spring Technologies NIC 511 Communication Card and Aclara kV2c Electric Meter with Silver Spring Technologies NIC 511 Communication Card (issued January 27, 2017).

<sup>7</sup> Ruling Denying O&R Motion to Strike Testimony, supra n. 1, pp. 24-25. The other issues we found to be outside the scope of these proceedings were the health, safety, privacy, security, energy savings, and benefit/cost of smart meters. The single issue in Ms. Kopald's testimony that we found to have been properly raised was a challenge to the design and structure of the AMI opt-out fees in O&R's proposed rate plan.

<sup>8</sup> Ms. Kopald also appealed a second ruling in which we denied her motion to file supplemental testimony after the filing deadline. See Ruling Denying Motions to Submit Supplemental Testimony, pp. 5-6 (issued September 25, 2018). In our ruling, we found that the proffered testimony addressed health, safety and functionality issues associated with smart meters, all of which have already been decided by the Commission and are otherwise beyond the scope of these proceedings.

Kopald filed five separate motions to compel IR responses from O&R and DPS Staff.<sup>9</sup>

On October 11, 2018, we issued a ruling granting in part and denying in part Ms. Kopald's five motions to compel.<sup>10</sup> We found that O&R and DPS Staff should answer certain IRs because the requested information is relevant to these proceedings. Among the IRs that we found O&R should answer was IR 86, which asks the following:

Please provide any data on meter failure rates over time (regarding meter type being used) in the Company's possession.

On October 5, 2018, O&R provided the following response to IR 86:

The manufacturer of the Smart Meters (i.e., Aclara) that the Company is deploying indicated that they have a typical useful life of 20 years. In addition, most AMI deployments across the United States use a 20-year meter life span and business case. The Company used this 20-year life in calculating the depreciation expense associated with AMI meters. The 20-year life of AMI meters did not factor into the Company's calculation of the opt-out fees.

We denied Ms. Kopald's motion to compel O&R's responses to other IRs, including IR 35, which sought additional information on a study by Frank Leferink and others (Leferink Study) about smart meter accuracy and the potential for

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<sup>9</sup> Three motions were directed to O&R and two were directed to DPS Staff.

<sup>10</sup> Ruling Granting in Part and Denying in Part Kopald Motions to Compel O&R and DPS Staff Responses to Information Requests, p. 13 (issued October 11, 2018). This ruling was preceded by a conference with the parties and an initial ruling (issued September 28, 2018) requiring O&R to respond to a total of 18 IRs.

overbilling.<sup>11</sup> We found IR 35 and the Leferink Study to be outside the scope of these rate proceedings because meter functionality issues were previously determined by the Commission.<sup>12</sup>

On October 18, 2018, Ms. Kopald filed an application along with a draft subpoena duces tecum seeking our issuance of a subpoena to the Aclara Companies pursuant to 16 NYCRR § 3.4. In support of the application, Ms. Kopald asserts that "O&R made claims about what it was told orally by one or more of the Aclara entities" about the Leferink Study and the functionality of smart meters, and that those claims "should be substantiated with whatever documents the Aclara entities have."<sup>13</sup> She further asserts that O&R's claims raise questions about the evidence the Aclara Companies have about their smart meters that may affect rate base and the proper calculation of depreciation and therefore the rate increase for customers.<sup>14</sup> Ms. Kopald states that the information requested in the subpoena "was not necessarily provided" in the proceeding in which the Commission approved O&R's use of the Aclara Meters,<sup>15</sup> but that such information would "shed light on a proper depreciation and other accounting calculations" relevant to these rate proceedings.

The draft subpoena appended to the application contains twelve unnumbered but bulleted document requests. All but one of the requests seek documents related to smart meter

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<sup>11</sup> F. Leferink, C. Keyer, A. Melentjev, Static Energy Meter Errors Caused by Conducted Electromagnetic Interference, IEEE Electromagnetic Compatibility (2016).

<sup>12</sup> Ruling Granting in Part and Denying in Part Kopald Motions to Compel, supra n. 10, p. 15.

<sup>13</sup> Kopald Subpoena Application, p. 1

<sup>14</sup> Id.

<sup>15</sup> Cases 16-E-0242 and 16-E-0366, Aclara Technologies - Meter Approvals, supra, n. 6.

functionality, including documents about the Leferink Study, meter errors, overbilling, performance, accuracy, and failure rates.<sup>16</sup>

The last bulleted subpoena request seeks:

- All notes, studies and all other documents regarding evidence about the service life of the METERS. This request is not limited to equipment in any specific jurisdiction and refers to the same equipment sold to O&R and/or CONED [Consolidated Edison Company]; it should be read to cover all jurisdictions.<sup>17</sup>

Ms. Kopald justifies this request for information related to smart meter service life by alleging a link between how long the meters last and the meters' depreciation rate. She claims that this information is needed in order to get "the best possible calculation of the appropriate electricity and gas rate increases" to be imposed on ratepayers.<sup>18</sup>

In an October 22, 2018 email ruling, we provided the parties with the opportunity to respond to Ms. Kopald's subpoena application by October 26, 2018. We directed Ms. Kopald to confirm service on the Aclara Companies by the New York Secretary of State's Office and file an affidavit of service accordingly.<sup>19</sup>

On October 23, 2018, O&R filed a response to the subpoena application, arguing that it seeks documents "wholly outside the scope of issues relevant to these base rate

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<sup>16</sup> Kopald Subpoena Application, Draft Subpoena, pp. 1-2.

<sup>17</sup> Id., p. 3.

<sup>18</sup> Id., p. 4.

<sup>19</sup> Although Ms. Kopald filed an affidavit of service on October 22, 2018 following our email ruling, it only stated that the subpoena application had been served on the Secretary of State. It did not confirm that the Secretary had in turn transmitted it to the Aclara Companies, as our October 22, 2018 ruling required.

proceedings.”<sup>20</sup> In support of its position, O&R points not only to the Commission’s previous decisions, but to our previous rulings.<sup>21</sup> O&R argues that its response to IR 86 and its Depreciation Panel testimony and depreciation study exhibit provide sufficient service life and depreciation information, which Ms. Kopald also seeks from Aclara. O&R asserts that its depreciation analysis is based on survivor curves measured against a class of assets, and the fact that some individual meters may operate for less than the predicted service life does not render its depreciation assumptions invalid. O&R also asserts that, in light of the “general industry-wide acceptance of this 20-year service life standard” for smart meters, “there is no basis to authorize Ms. Kopald to set sail on the expansive fishing expedition described in the [subpoena] application.”<sup>22</sup>

DPS Staff also filed a response, objecting to the subpoena’s issuance and pointing to our prior rulings and the Commission’s previous determinations. DPS Staff asserts that “[i]f over time legitimate evidence surfaces to suggest that the average service life of the Aclara meters are either shorter or longer than 20 years, an adjustment will be made to the depreciation rates,” but that at this time, there is no sound basis for Ms. Kopald to seek the service life of Aclara meters and the subpoena request is based on “pure speculation.”<sup>23</sup> DPS Staff further asserts that there was an opportunity to challenge

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<sup>20</sup> O&R Response, p. 1.

<sup>21</sup> Id., p. 2.

<sup>22</sup> Id., pp. 1-2. In its response to Ms. Kopald’s subpoena application, O&R cites its depreciation study (submitted as Exhibit DP-E1 to the Depreciation Panel’s direct testimony). That study does not contain results for smart meter depreciation. Instead, a separate exhibit, DP-E2, contains the depreciation information for AMI meters.

<sup>23</sup> DPS Staff Response, p. 2.

the accuracy and performance of the Aclara meters during the cases in which the Commission approved the use of those meters,<sup>24</sup> both of which were publicly noticed pursuant to the State Administrative Procedure Act.<sup>25</sup>

Protect Orange County (POC) submitted a response in support of Ms. Kopald's application and the issuance of the subpoena. POC argues first that a 20-year service life is contrary to the 2012 Internal Revenue Service Technical Advice Memorandum (attached as Exhibit 2 to POC's response), which provides for a shorter service life for smart meters for depreciation purposes, and that depreciation and rates cannot be accurately calculated without information on meter failure rates.<sup>26</sup> POC also argues that in the proceeding approving Aclara's meters, the compliance report addresses only electromagnetic field tests and not meter accuracy tests, and therefore the Commission did not address this issue when it approved O&R's use of Aclara meters.<sup>27</sup>

Grassroots Environmental Education (Grassroots) also submitted a response in support of Ms. Kopald's application, arguing that anything pertaining to costs is eligible for review in these rate proceedings and that issues of functionality pertain to costs and therefore should be reviewed.<sup>28</sup> Grassroots also argues that, even though meter functionality has already been determined by the Commission, any service life issues that shed light on depreciation and the costs O&R incurs to "fix

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<sup>24</sup> Cases 16-E-242 and 16\_E-0366, Aclara Technologies - Meter Approvals, supra, n. 6.

<sup>25</sup> DPS Staff Response, p. 2.

<sup>26</sup> POC Response, pp. 2-3.

<sup>27</sup> Id., pp. 5-6.

<sup>28</sup> Grassroots Response, pp. 1-2.



glitches" should be reviewed now; otherwise Grassroots' right to conduct a cost review in these proceedings is impaired.<sup>29</sup>

Finally, the Aclara Companies responded to Ms. Kopald's subpoena application, asserting that the subpoena requests some information "not in possession, custody or control of Aclara" and that the Companies cannot be compelled to produce information "not in existence."<sup>30</sup> Aclara also states that, with respect to the materials that do exist, the subpoena seeks "highly confidential materials that are outside the scope of this proceeding."<sup>31</sup>

On October 29, 2018, Ms. Kopald filed a reply to Aclara's response, claiming that extraordinary circumstances should override the general bar against replies in Rule 3.4(d) (3).<sup>32</sup>

#### DISCUSSION

The procedure for issuance of a subpoena in a rate proceeding requires written application to the presiding Administrative Law Judge, specifying the documents and/or testimony sought and the reasons why the information sought is

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<sup>29</sup> Id. p. 3.

<sup>30</sup> Aclara Response, p. 1. Aclara also indicates that the subpoena is improperly directed to Aclara Technologies, LLC and Aclara Smart Grid Solutions, LLC, neither of which manufacture and/or supply smart meters to O&R.

<sup>31</sup> Id. Aclara's Response does not state why the information sought is confidential nor explain why it is outside the scope of this proceeding.

<sup>32</sup> Ms. Kopald's proposed reply papers misstate Aclara's assertions and, even though we have considered her filing, the arguments presented do not add any new, relevant or pertinent information, nor would they change our determination in this ruling.

"reasonably related to the subject of the proceeding."<sup>33</sup> The application must be served on the corporation or person alleged to have the information sought and on all parties to the rate proceeding.<sup>34</sup> We treat Ms. Kopald's subpoena application as a motion.

Putting aside the draft subpoena's one request related to smart meter service life, the subpoena otherwise seeks information from the Aclara Companies about the functionality and accuracy of AMI smart meters. This request ignores our prior rulings, including our specific finding that smart meter functionality issues have already been addressed and determined by the Commission and therefore are outside the scope of these rate proceedings.<sup>35</sup> The Commission decided those issues when it initially authorized and later expanded the AMI program, when it denied Ms. Kopald's rehearing petition, and when it approved use of the Aclara meters in O&R's AMI program.<sup>36</sup> In sum, Ms. Kopald's application fails to show how these documents are "reasonably related to the subject of the proceeding," particularly in light of our prior rulings.<sup>37</sup> The majority of the documents sought from Aclara are not related to these proceedings at all.

With respect to the one remaining request for documents related to smart meter service life, although we find the issue to be one properly within the scope of these proceedings, we also find that O&R's response to IR 86 provided Ms. Kopald with the information that she now seeks from the

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<sup>33</sup> 16 NYCRR § 3.4(a)-(b).

<sup>34</sup> 16 NYCRR §§ 3.4(a), 3.5(e).

<sup>35</sup> Ruling Granting in Part and Denying in Part Kopald Motions to Compel, supra n. 10, pp. 14-15, 18-19.

<sup>36</sup> See nn. 3-6, supra.

<sup>37</sup> 16 NYCRR § 3.4(b).

Aclara Companies. O&R's response to IR 86 indicated that it was advised by Aclara that the smart meters have a typical 20-year "useful life" and that "most AMI deployments across the United States use a 20-year meter life span and business case." O&R stated that it used this 20-year life in calculating the depreciation expense associated with the meters. O&R's response to IR 86 also indicated that the 20-year service life "did not factor into the Company's calculation of the opt-out fees." In addition, an exhibit to O&R's Depreciation Panel's testimony provides information about AMI meter depreciation.<sup>38</sup>

The Commission's discovery rules provide that the scope of discovery requests is limited to information "not already possessed by or readily available to" the requesting party, or "not conveniently obtainable elsewhere."<sup>39</sup> Here, Ms. Kopald already has O&R's response to IR 86 regarding smart meter service life and depreciation. Ms. Kopald's subpoena application does not state any basis to require the Aclara Companies to substantiate O&R's response to IR 86 or the Depreciation Panel's testimony and exhibits. Her application presents no facts that call into question the accuracy or completeness of the evidence advanced by O&R. There is no need to require this same kind of information from the Aclara Companies. Ms. Kopald is of course free to follow up with O&R if she has additional questions related to the response to IR 86. But her application fails to justify why a subpoena should issue to Aclara.

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<sup>38</sup> See January 26, 2018 O&R Tariff Amendments, Depreciation Panel Exhibit DP-E2, Summary of Annual Depreciation Rates as of 2017.

<sup>39</sup> 16 NYCRR § 5.8(a).

CONCLUSION

In light of the foregoing, we deny Ms. Kopald's application for issuance of a subpoena duces tecum to the Aclara Companies.

(SIGNED)

MAUREEN F. LEARY

(SIGNED)

DAKIN D. LECAKES