

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.

RESPONSE TO MOTION FOR INTERLOCUTORY REVIEW

Introduction

On September 25, 2018, Ms. Deborah Kopald filed a motion with the Secretary to the Public Service Commission (Commission) seeking an interlocutory review of the September 10, 2018 Ruling Denying O&R’s Motion to Strike Testimony (Ruling) in the above-captioned proceedings.¹ Specifically, Ms. Kopald seeks an interlocutory review of the section of the Ruling addressing Advanced Metering Infrastructure (AMI) program costs.² In her Motion, Ms. Kopald largely reiterates her previous argument that the review of AMI costs should not be limited to accounting costs, but rather “should encompass a holistic review of the functionality of the [AMI meter], the claimed benefits, the externalities (negative and otherwise) and the question of whether it benefits the ratepayer or not.”³

As explained herein, Ms. Kopald’s Motion should be rejected because she has not complied with the Commission’s requirements under 16 NYCRR §4.7(c)(2) insofar as she failed to allege and identify any extraordinary circumstances warranting an interlocutory review of the Ruling. Notwithstanding this fatal defect, Ms. Kopald has failed to assert any arguments that would warrant an interlocutory review of the Ruling, but rather continues to raise the same claims considered and rejected by the administrative law judges (ALJs) in the Ruling. In the event the Commission decides to entertain Ms. Kopald’s Motion, for the reasons that follow, Ms. Kopald’s request for an interlocutory review of the Ruling should be denied.

¹ 18-E-0067 and 18-G-0068, *supra*, Motion for Interlocutory Review (filed September 24, 2018) (Motion). The Ruling was issued in response to Orange and Rockland Utilities Inc.’s (O&R or the Company) Motion to Strike Improper Testimony, filed June 15, 2018.

² Ruling, pp. 20-22.

³ Indeed, the majority of Ms. Kopald’s Motion is comprised of excerpts from the Motion to Compel Response to Interrogatories O&R IR Set 1, filed August 27, 2018, and the Motion to Compel Response to Interrogatories DPS Set 1 filed August 28, 2018.

Background

The ALJs provided a thorough and extensive account of the history of the AMI program leading up to the Ruling and we will not repeat that summary herein other than to provide background as it relates to the instant proceedings. On January 26, 2018, the Company filed a proposal for new electric and gas rates effective January 1, 2019. On May 29, 2018, Ms. Kopald submitted direct testimony in these proceedings, which addressed a number of issues related to AMI. On June 15, 2018, the Company filed a motion to strike the direct testimony of Ms. Kopald on the basis that the testimony was improper as it failed to address issues relevant to the Company's rate filings. O&R noted that Ms. Kopald was attempting to relitigate certain AMI-related issues that were previously addressed and definitively decided by the Commission.⁴ The ALJs issued the Ruling on September 10, 2018, which found that the Commission had already considered and decided most of the issues raised in Ms. Kopald's testimony. As is relevant here, the ALJs further limited the scope of these rate proceedings to the ratemaking mechanics of incorporating the AMI expenditures into rates and the reasonableness of those expenditures.⁵

Discussion

1. The Commission Should Deny Ms. Kopald's Motion As It Fails to Allege And Identify Extraordinary Circumstances Warranting an Interlocutory Review

The Commission's regulation, 16 NYCRR §4.7(a), states that "[i]nterlocutory review of a ruling by a presiding officer will be available and may be sought only in extraordinary circumstances." The regulation explicitly requires a party seeking interlocutory review to allege and identify in the motion the extraordinary circumstances that warrant the interlocutory review (16 NYCRR §4.7[c][2]). Ms. Kopald's Motion fails to allege or identify any extraordinary circumstances that would warrant an interlocutory review of the Ruling and, for this reason, the Commission should reject Ms. Kopald's Motion.

⁴ Case 17-M-0178, Petition of Orange and Rockland Utilities, Inc. for Authorization of a Program Advancement Proposal, Order Granting Petition in Part (issued November 16, 2017) (November 2017 Order) and Order Denying Petition (issued May 21, 2018).

⁵ Ruling, p. 27.

2. There Are No Extraordinary Circumstances Warranting an Interlocutory Review of the Ruling

Ms. Kopald did not and, in fact, could not have identified extraordinary circumstances warranting an interlocutory review of the Ruling because no such circumstances exist. Read in its most positive light, the only argument in the Motion that could be interpreted as an argument of extraordinary circumstances is Ms. Kopald's claim that the Ruling affects all future decisions in these proceedings; however, this does not amount to extraordinary circumstances. Ms. Kopald's Motion is merely another attempt to improperly expand these rate proceedings into a full reexamination of the Commission's previous authorization of the Company's AMI program and should, for the reasons discussed in the Ruling, be rejected.⁶

Ms. Kopald appears to argue that the ALJs erred in addressing the definition of "costs" because O&R had not raised this issue in its Motion to Strike Improper Direct Testimony; however, this argument is wholly without merit.⁷ Notably, Ms. Kopald raised the issue herself in her Answer in Opposition to ORU Motion to Strike Improper Direct Testimony (Answer), a fact she acknowledges in the Motion. Specifically, Ms. Kopald states: "I responded to O&R by pointing to the verbiage in the [November 2017 Order] in [Case] 17-M-0178 that specifically said that costs were to be reviewed."⁸ Ms. Kopald also squarely addressed the definition of costs in the Answer, stating: "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

⁶ The Commission rejected a similar attempt by Ms. Kopald to revisit its approval of O&R's AMI program in the Order Denying Petition, issued May 21, 2018, in Case 17-M-0178.

⁷ Ms. Kopald also appears to argue that the Ruling is deficient insofar as it "does not give any legal argument for why the use of the word costs in the [November 2017 Order] must only be accounting costs;" however, this argument is misplaced. The ALJs were under no obligation to provide case law support for their interpretation of the Commission's November 2017 Order. Further, although Ms. Kopald cites to decisions from the Supreme Court of Kansas and the Supreme Court of Oklahoma, neither is binding on the Commission. Moreover, a mere cursory review of the cases cited by Ms. Kopald shows that neither stands for the propositions suggested by Ms. Kopald nor is relevant to addressing the definition of "costs" in the context of the November 2017 Order.

⁸ Motion, p. 1, citing to Kopald Answer at 1.

power.”⁹ Moreover, Ms. Kopald’s direct testimony discussed AMI program costs on multiple occasions.¹⁰

In the Ruling, the ALJs appropriately reviewed the issue of the definition of “costs” in the context of the November 2017 Order and the instant rate proceedings and properly determined that “the issues 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 [November 2017] Order.”¹¹ In her Motion, Ms. Kopald merely raises the same arguments that were rejected by the ALJs in the Ruling and therefore fails to identify any legitimate basis for an interlocutory review of the Ruling.

Notwithstanding the ALJs instruction that “[a] subsequent rate proceeding cannot be used to circumvent proper procedural avenues for challenging prior Commission orders,”¹² Ms. Kopald continues to attempt to use these rate proceedings to challenge the Commission’s prior approval of O&R’s AMI program. Ms. Kopald attempts to do so by incorrectly arguing that the Commission intended for Staff to conduct a review of all of the AMI costs in these proceedings, including various societal costs related to safety, privacy and security, all of which amounts to another full review of the AMI program. As the ALJs correctly pointed out in the Ruling, these societal costs “are not the sort of ‘costs’ the Commission intended to be considered [in the rate proceedings] when it deferred review of AMI costs in the [November 2017] Order.”¹³ The Motion is yet another attempt by Ms. Kopald to pursue a second plenary review of the AMI project in the hope of obtaining different results. Given that no extraordinary circumstances exist warranting an interlocutory review of the Ruling, the Commission should deny Ms. Kopald’s Motion in its entirety.

⁹ Kopald Answer, p. 2. Given that Ms. Kopald directly addressed the definition of costs in her Answer, it is unclear why she states in the Motion that “it was not necessarily possible to imagine ahead of time that the [R]uling on this motion which was on whether or not to strike the testimony, was going to contemplate how to define the word costs.” Motion, p. 2.

¹⁰ Kopald Direct Testimony, pp. 3-4, 8-10, 13, 18-21, 24-29.

¹¹ Ruling, p. 27.

¹² Id.

¹³ Id. at 21-22.

Conclusion

For the reasons discussed herein, Department Staff respectfully requests that the Commission reject Ms. Kopald's Motion for an interlocutory review of the Ruling.

Dated: October 3, 2018

Respectfully Submitted,

/s/ Lindsey N. Overton Orietas

Lindsey N. Overton Orietas
Staff Counsel

Graham Jesmer
Staff Counsel
NYS Department of Public Service
3 Empire State Plaza
Albany, New York 12223-1350