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.

Reply to Motion for Subpoena Issuance

Pursuant to 16 NYCRR §3.4 (d)(3), I file this reply for consideration because it is an extraordinary circumstance that Aclara Meters LLC is effectively claiming that because they install the meters and do not manufacture them, they should not have to answer questions.

There were two cases involving Aclara Cases 16-E-0242 and 16-E-0366, in which they were supposed to demonstrate and make claims as to the safety and other questions about the meters.

If Aclara cannot vouch for certain questions about meter functionality and performance, why were they the only party called upon to answer questions about whether the meters should be approved for use in 16-E-0242 and 16-E-0366?! Why were they vouching for the meter manufacturer? These serious questions need to be asked. At this juncture Aclara should be made by this tribunal to answer who manufacturers the meters with all of their attendant contact information, if not O&R, who may actually not know, though that isn't clear- they might (and should). This new information by Aclara, that they do not even manufacture the meters is new information and raises new questions about their approval and may even trigger *de novo* review of their approval.

Aclara also FALSELY implies that I did not request the information from Aclara Meters LLC. I absolutely did as well as the two other Aclara entities listed in the Department of State Division of Corporations Database. It is irrelevant that I over-served which they are trying to make a faux issue out of; the key is the subpoena <u>is</u> also directed at Aclara Meters LLC.

Furthermore, Aclara's response to O&R that the Leferink study, previously before this tribunal, was flawed should thus be ignored as apparently they have no documents showing this study is flawed; O&R's response to my interrogatory 35 in set one (Exhibit 1) should be viewed as <u>hearsay</u>, because there are no documents that successfully refute the Leferink study, which suggests that there is an overbilling problem with the current transformer in the majority of homes- the majority of homes use dimmer switches. The hearsay nature of Aclara's response is an extraordinary circumstance, in that it should suggest to this tribunal that there are in fact documented problems with the meters.

Also pursuant to the above point about reliance upon Aclara, if O&R is relying upon the hearsay statement of Aclara to dismiss the findings of the Leferink study (Exhibit 2), what other hearsay statements of Aclara were made that were relied upon to approve the meters? Even if the meter approval was justified with the knowledge provided, the manufacturer should have been asked questions about parts failures, which also now may factor into post-market approval performance.

The post-market approval performance of the meters and their failure rates are absolutely necessary to know to calculate depreciation appropriately. So are any post-market failures that require retrofits which could be costly to O&R. In fact, this tribunal's order issued on October 11, 2018 seeks information that could have bearing upon retrofits regarding future functionality:

> In our September 28 ruling, we found that O&R should answer IRs 72(a)-(b), which are the same as IRs 16(a)–(b) directed to DPS Staff. These IRs both ask about whether smart meters can be retrofitted with software and other additions to allow future applications, such as time of use rates, critical peak pricing and rebates, and demand side management programs, and further ask about the cost of retrofitting.
>
> See ¶3 page 16 an ¶1, page 17 of the 10/11/18 ruling

Aclara also fails to identify the totality of which questions they DO have information for-merely stating:

> *For example*, a request on page 3 of the Application demands production of "All notes, studies and all other documents about the failure rates of the METERS and everything else known about failures of the METERS…"
>
> (Emphasis Added)

So, Aclara implies they can answer some of the questions posed, but they conclusorily assert without explanation that the remaining information that is in their possession is "highly confidential". Certainly they could get a protective order pursuant to CPLR 3103 if they had even demonstrated that it was sensitive, but they didn't ask for that, just saying it was confidential.

Besides the fact that they fail to identify the totality of information they do have that the subpoena requests, they didn't say anything requested was a trade secret, which is what the word "confidential" usually implies.

McKinney's commentary on CPLR 3103 delineates the six-factor test for trade secret recognition by the state:

> The court noted that the New York Court of Appeals has adopted the definition of trade secrets from section 757 of the Restatement of Torts, which includes any formula. Pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. Ashland Mgmt, Inc. v Janien, 82 N.Y.2d 395, 407,604, N.Y.S.2d 912, 917-18 (1993).

In deciding whether information constitutes a trade secret, this definition requires the court to consider several factors including:

(1) the extent to which the information is known outside of the business;
(2) the extent to which it is known by employees and others involved in the business;
(3) the extent of measures taken by the business to guard the secrecy of the information;
(4) the value of the information to the business and its competitors;
(5) the amount of effort or money expended by the business in developing the information; and
(6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*; Restatement of Torts § 757, comment b.

The Court of Appeals has stressed that "a trade secret must first of all be secret," and this determination is usually a question of fact. *Ashland Mgmt.*, 82 N.Y.2d at 407, 604 N.Y.S.2d at 918.

Again, Aclara has made no showing to justify the sensitivity of the other documents requested and/or why they would even be subject to a protective order and has merely stated it is outside the scope of the proceeding without showing why. They fail to articulate any of the factors in the *Ashland* six-factor test.

If something is "confidential", then Aclara absolutely had a responsibility to articulate why the information was requested and/or that a trade secret was involved. They have utterly failed to do so.

The meter failure issue continues to be an issue of concerned as demonstrated in an Arizona Corporation Commission case where over 10% of meters failed in 8-11 years. (Exhibit 3 which includes Staff Data Request (Interrogatory) to Arizona Public Service Company ("APS") and Scott Borkenkircher testimony (see esp. pages 7-8 of that testimony which is referred to in the Data Request.

Sincerely yours,

/s/ Deborah Kopald

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Fort Montgomery, NY

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