

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 GRANTING IN PART AND DENYING IN PART KOPALD MOTIONS TO COMPEL O&R AND DPS STAFF RESPONSES TO INFORMATION REQUESTS

(Issued October 11, 2018)

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

INTRODUCTION

This ruling incorporates and supplements our September 28, 2018 ruling memorializing the September 20, 2018 conference to resolve discovery disputes and also addresses the remaining information requests (IRs) that are at issue in the five motions to compel responses filed by pro se intervenor Deborah Kopald. Between late August and mid-September 2018, Ms. Kopald filed three motions directed to Orange and Rockland Utilities, Inc. (O&R) and two motions directed to trial staff of the Department of Public Service (DPS Staff), to compel responses to numerous IRs that relate almost exclusively to O&R's Advanced Metering Infrastructure (AMI) program and the digital "smart meters" being deployed in its service territory as part of that program.

On September 20, 2018, we conducted a telephone conference with DPS Staff, O&R, Ms. Kopald and certain other

parties¹ to resolve the pending motions. During the conference, we discussed the IRs at issue. On September 28, 2018, we issued an initial ruling memorializing the discussions at the conference and finding that within ten days, O&R should answer certain IRs served by Ms. Kopald. In that initial ruling, we indicated that we intended to issue a more formal ruling on the remaining IRs at issue in the five motions.

This constitutes our formal ruling on the remainder of the IRs at issue. As set forth below and in our September 28, 2018 ruling, we grant in part and deny in part Ms. Kopald's three motions to compel O&R to respond to the IRs served. As set forth below, with one exception, we deny Ms. Kopald's two motions to compel DPS Staff to respond to the IRs served.

BACKGROUND

On January 26, 2018, O&R filed tariff amendments proposing increases in electric and gas delivery rates and charges in its Rockland, Orange and Sullivan County service territory. Included in its tariff amendments, O&R sought recovery of expenditures associated with the AMI program.

DPS Staff and several other parties, including Ms. Kopald, filed testimony in response to O&R's filing. DPS Staff's testimony briefly discussed the AMI program and stated that O&R's proposed budgets for AMI-related costs are within the expenditure cap previously approved by the Commission, that the AMI deployment is on schedule, and that "the project costs included in the capital budget are reasonable" based on the

¹ All parties were notified of the conference. The only parties appearing were DPS Staff, O&R, Ms. Kopald, Environmental Defense Fund, Public Utilities Law Project, and the Utility Intervention Unit of the Department of State.

project's historic costs.² Ms. Kopald's testimony raised several concerns about the AMI program, particularly as to the health, safety, and functionality of smart meters, the societal costs and benefits of the program, and the alleged lack of fairness in charging opt-out fees to customers with disabilities who do not wish to have a smart meter.

O&R filed a motion to strike Ms. Kopald's testimony from the record in its entirety, claiming that the issues raised had already been decided by the Commission in prior proceedings and that the testimony otherwise failed to raise issues relevant to the rate filing.

On September 10, 2018, we issued a ruling denying O&R's motion to strike Ms. Kopald's testimony, but found that most of the testimony raised issues that are not properly considered in these rate proceedings because they do not deal with ratemaking mechanics and the incorporation of AMI expenditures into rates.³ We defined in that ruling the issues that may be raised in these proceedings and identified those that are beyond its scope or that have already been decided by the Commission in its 2015 order establishing rates and approving O&R's AMI program (2015 Rate Order),⁴ in its 2017 order

² Staff Electric Infrastructure and Operations Panel Testimony, p. 20.

³ Ruling Denying O&R's Motion to Strike Testimony (issued September 10, 2018).

⁴ 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 (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.

enhancing and expanding the AMI program (AMI Expansion Order),⁵ and in its 2018 order denying Ms. Kopald's rehearing petition on the AMI Expansion Order (Rehearing Order).⁶ The single issue in Ms. Kopald's testimony that we found to have been properly raised in these proceedings was a challenge to the design and structure of the AMI opt-out fees in O&R's proposed rate plan.

Kopald Motion 1 to O&R

On August 24, 2018, Ms. Kopald served a motion to compel O&R to respond to a total of 28 IRs covering a wide range of topics, including IRs 4-16, 19, 22-24, 28-29, 31, 34-39, and 42-43 (Motion 1). In response to the IRs at issue in Motion 1, O&R had either provided a limited response or had objected to the IR on the grounds that it called for speculation, was irrelevant or not reasonably calculated to lead to the discovery of admissible evidence, was overbroad, unduly burdensome, harassing, expensive, and oppressive, or exceeded the scope of these rate proceedings.⁷

⁵ 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). 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.

⁶ Case 17-M-0178, supra, n. 5, Order Denying Rehearing (issued May 21, 2017). Ms. Kopald filed a petition for rehearing of the AMI Expansion Order, which the Commission denied. On the merits, the Commission rejected her claims related to the health and safety, functionality, cost/benefits, privacy, security, and other challenges asserted against smart meters and the AMI program.

⁷ Kopald Motion 1, Exhibits 2, 4 and 7, Kopald IRs and O&R responses. O&R provided an answer to seven of the 28 IRs, objected to one IR but provided a response, and objected and provided no response to the remaining 20 IRs.

In Motion 1, Ms. Kopald argues that O&R had failed to answer or sufficiently answer IRs related to AMI costs, including the break-down of those costs;⁸ health, safety and legal matters; what a different utility had done;⁹ technical information about meter functionality and effects on medical equipment;¹⁰ and privacy and security risks.¹¹ Ms. Kopald claims that the costs associated with health and safety were proper for these proceedings because those issues create "a legal risk and a likely cost of settlement."¹² She justifies the IRs about the actions of another utility because of the appearance in these proceedings of counsel for that utility.¹³

On August 27, 2018, O&R filed a response to Motion 1, arguing that the IRs seek information about issues already decided by the Commission that should not be revisited or that are entirely outside the scope of these rate proceedings.¹⁴ Specifically, O&R argues that the Commission has already decided smart meter health, safety, privacy, and security issues.¹⁵ O&R also argues that Ms. Kopald construed too expansively the Commission's prior AMI Expansion Order, which provided that review and approval of AMI costs were deferred for consideration until these rate proceedings.¹⁶

During the September 20 conference and in our September 28, 2018 ruling, we clarified IRs 4-7 and found that

⁸ Kopald Motion 1. pp. 1-2.

⁹ Id., pp. 2-5.

¹⁰ Id., pp. 5-9.

¹¹ Id., pp. 10-11.

¹² Id., p. 10.

¹³ Id., p. 6

¹⁴ O&R Response, pp. 6-8.

¹⁵ Id., pp. 4-5; 8.

¹⁶ Id., p. 7.

O&R should respond to those questions and identify the factors the company considered in establishing the AMI program and setting opt-out fees, including if it considered the actions of other states or other utilities. This leaves IRs 8-16, 19, 22-24, 28-29, 31, 34-39, and 42-43 in Motion 1 to be addressed in this ruling.

Kopald Motion 2 to DPS Staff

On August 28, 2018, Ms. Kopald filed a motion to compel DPS Staff to respond to seven IRs, numbered 14 to 20 (Motion 2). These IRs asked about the impact of smart meters on electric vehicles, how smart meter data works to reduce electric and gas system losses, whether meters are safe from hacking, and whether AMI systems reduced customer bills or electricity use or resulted in peak loaders being turned off.¹⁷ One IR (16(a)-(b)) asked whether the meters could be retrofitted for future applications and about the cost of such retrofits.¹⁸ In response to each IR, Staff objected that the IR sought information beyond the scope of these proceedings and was duplicative of IRs served on O&R and more appropriately should be directed to the company.¹⁹

In Motion 2, Ms. Kopald argues that the AMI program itself "is subject to further review in this base rate proceeding" and the IRs pertain to costs, which should not be limited to "accounting costs."²⁰ She further states that the IRs ask about DPS Staff's assumptions about the AMI program,

¹⁷ Kopald Motion 2, Exhibits 1-7.

¹⁸ IR 16(a)-(b) to DPS Staff duplicates IR 72(a)-(b) to O&R, which is at issue in Motion 3, discussed below, and which we required O&R to answer in our September 28, 2018 ruling.

¹⁹ Id.

²⁰ Id. pp. 1-6.

including whether the program reduces energy usage or system losses, or has other benefits.²¹

On September 5, 2018, DPS Staff filed a response to Motion 2, arguing that the IRs inappropriately seek to revisit the Commission's prior approvals of O&R's AMI program.²² DPS Staff asserts that the IRs are directed at issues outside the scope of the rate proceedings, request opinions about O&R's statements without providing the source of those statements, and are, in some cases, unreasonably repetitive and duplicative of IRs served on O&R.²³

On September 5, 2018, Protect Orange County and the Orange County Energy Coalition submitted responses in support of Motions 1 and 2, echoing the positions taken by Ms. Kopald.

Our September 28, 2018 ruling did not address Motion 2 and IRs 14-20 directed to DPS Staff.

Kopald Motions 3 and 4 to O&R

On September 14, 2018, Ms. Kopald filed a third motion, this time to compel O&R's responses to IRs 45-57 (Set 2) and IRs 58-75 (Set 3) (Motion 3). O&R had objected to each of the IRs in Sets 2 and 3, asserting that the questions called for speculation, were irrelevant or not reasonably calculated to lead to the discovery of admissible evidence, were overbroad, unduly burdensome, harassing, expensive, or oppressive, or exceeded the scope of the rate proceedings.²⁴

Most of the IRs in Set 2 were repeated almost verbatim in Set 3, specifically, IRs 45-57 were repeated in IRs 58-69.

²¹ Id. p. 7-8.

²² DPS Staff Response, pp. 5-8.

²³ Id.

²⁴ Kopald Motion 3, Exhibits 3-4, Kopald IRs and O&R responses.

These IRs asked about AMI related and non-AMI related regulatory net assets and expenses, as well as the specific costs related to various aspects of the AMI program and other related programs. In our September 28, 2018 ruling, we treated IRs 45-57 and IRs 58-69 as one set and found that O&R should provide responses.²⁵ In addition, we found that O&R should answer IR 72(a) and (b), which sought information about retrofitting smart meters and the associated costs.

The remaining IRs at issue in Motion 3, IRs 70-71, 72(c), and 73-75, were not addressed in our September 28 ruling. These IRs duplicated certain IRs previously served on DPS Staff that are at issue in Kopald Motion 2, discussed above. They ask about the impact of smart meters on electric vehicles, how smart meter data works to reduce electric and gas system losses, whether meters are safe from hacking, and whether AMI systems have reduced customer bills or electricity use, or have resulted in peak loaders being turned off.

As to these IRs, Ms. Kopald argues in Motion 3 that she needs to know how smart meters work in order to perform a "cost review exercise" and to assess whether AMI is doing something "duplicative of what is already being done."²⁶ She also claims that it is important to assess whether the AMI

²⁵ The IRs in both Sets 2 and 3 were prefaced with a statement that each related to O&R's third settlement offer. Our September 28, 2018 ruling (pp. 4-5) provided that O&R's responses to IRs 58-69 should be based on its initial filing and not on a settlement proposal. These IRs also asked for a break out of the portion of AMI costs related to the approval granted in the Commission's 2017 AMI Expansion Order. Our ruling (pp. 4-5) provided that O&R may provide a break out of costs to the extent available.

²⁶ Kopald Motion 3, pp. 6-7.

program is actually doing what O&R claims in order to determine if AMI costs should be included in rates.²⁷

On September 17, 2018, Ms. Kopald filed a fourth motion to compel O&R's responses to IRs 76 to 98 (Set 4), IR 99 to 100 (Set 5), and IR 101 (Set 6) (Motion 4). Nearly all of these IRs had asked for information about O&R's Distributed System Implementation Plan (DSIP) filings in a separate Commission proceeding.²⁸ The IRs questioned O&R's representations in that proceeding, including how AMI data is collected and used, how data is sent faster using AMI meters than the existing analog metering system, how AMI meters monitor the distribution system better than the existing metering system, how AMI reduces generation emissions and provides price signals, how AMI uses telecommunications standards, and generally how AMI is better than the existing analog system. The IRs also asked about meter failure rates, service calls, and future applications.

Without answering any of the IRs, O&R had objected on the same grounds previously asserted in its prior IR responses, specifically, that the questions called for speculation, were irrelevant or not reasonably calculated to lead to the discovery of admissible evidence, were overbroad, unduly burdensome, harassing, expensive, or oppressive, or exceeded the scope of the rate proceedings.

In Motion 4, Ms. Kopald argues that the IRs seek evidence substantiating O&R's representations about AMI program benefits and what the program can do.²⁹ Ms. Kopald further argues that if O&R's claims about the benefits of the AMI

²⁷ Id., pp. 8-9.

²⁸ Case 14-M-0101, Reforming the Energy Vision, O&R Initial Distributed System Implementation Plan (filed June 30, 2016).

²⁹ Kopald Motion 4, pp. 1-5.

program are unsubstantiated, or if the AMI program is not doing the tasks O&R claimed and is not benefitting rate payers, then rate payers should not be made to pay for it.³⁰ She claims that the IRs seek evidence to substantiate O&R's representations about the AMI program in its initial DSIP filing and its AMI Business Plan. She cites the Kentucky Public Service Commission's decision rejecting a similar smart meter program.³¹ She also argues that the IRs asked about meter functionality and how meters work is relevant here because it is related to AMI costs.³²

On September 20, 2018, O&R filed its opposition to both Motions 3 and 4. O&R argues that the IRs were "subverting the rate case process in these proceedings by improperly expanding the customary parameters of discovery."³³ O&R also argues that the IRs sought irrelevant information, particularly in light of the September 10, 2018 ruling and previous Commission determinations, and asked about information that is the subject of a separate proceeding.³⁴ O&R asserts that the IRs were improperly framed in the context of a confidential settlement offer.³⁵ O&R also asserts that the IRs asked for "granular cost information" well beyond the kind of cost information utilities are customarily required to produce in a rate case.³⁶

Our September 28, 2018 ruling addressed only IRs 85 and 86 at issue in Motion 4 and required O&R to respond to both

³⁰ Kopald Motion 3, pp. 1-4.

³¹ Id., 2-4

³² Id. pp. 6-7.

³³ O&R Response to Motions 3 and 4, p. 1.

³⁴ Id., pp. 2-4.

³⁵ Id., p. 3.

³⁶ Id., pp. 2-3.

because they asked about smart meter failures and projected cost savings resulting from the AMI program. We found both IRs to have potential impacts on rates.³⁷ Our ruling did not discuss the remaining IRs in Motion 4, namely, IRs 76-84, 87-101, which are addressed here.

Kopald Motion 5 to DPS Staff

On September 19, 2018, Ms. Kopald filed a fifth motion, this time to compel DPS Staff's responses to IRs 21-45 (Motion 5). Even though Motion 5 sought relief for all IRs from 21 to 45, it included as exhibits only IRs 21-25, 27-29, and 44-45, which showed DPS Staff's responses and/or objections.³⁸ The motion contains no evidence of DPS Staff's responses or objections to IR 26 and IRs 30-43. We therefore address here only the IRs that are included as exhibits to the motion, namely, IRs 21-25, 27-29 and 44-45.

The IRs that are at issue in Motion 5 asked DPS Staff for the "business case analyses" for the AMI program as identified in O&R's DSIP filing; for detailed proof about how AMI improves outage detection as claimed in the DSIP filing; for information O&R has provided to DPS about reduced energy usage by consumers and lowered bills; for evidence documenting claims that AMI as compared to the existing metering system increases the speed of data transmission, monitors O&R's distribution system better, reduces emissions, and allows for market participation; for information about companies that "refurbish and otherwise service analog meters"; and for the test results DPS has performed on AMI smart meters.

³⁷ September 28, 2018 ruling (pp. 2-3).

³⁸ See Motion 5, Exhibits 2-6, which contain only IRs 21-25, 27-29 and 44-45.

DPS Staff had objected to the IRs, but had provided responses to IRs 44-45. DPS Staff's objections claimed that the IRs were duplicative of IRs served on O&R, sought information belonging to O&R or related to the company's statements about AMI, and therefore should be directed to O&R instead. Staff also had objected, stating that the IRs sought information beyond the scope of the rate proceedings.

Ms. Kopald's motion argues that the IRs sought to elicit the "case analysis" for the AMI program in order to allow a comparison of current AMI costs.³⁹ Ms. Kopald claims that the IRs seek relevant information because they ask what DPS Staff knows about smart meters and about O&R's representations of AMI program benefits, such as reduced energy usage, privacy and security protections, customer participation in energy markets, changed customer behavior, better distribution monitoring and voltage control, reduced emissions, lower costs for REV programs, stronger price signals, better storm response, and/or overall customers savings.⁴⁰ Ms. Kopald repeatedly references the claims of her proffered expert, Dr. Timothy Schoechle, and asserts that he disputes most of O&R's claims about the AMI program's benefits.⁴¹ Ms. Kopald argues that DPS Staff should be required to show proof of AMI's benefits and provide support for O&R's representations about the program.⁴²

³⁹ Kopald Motion 5, p. 1.

⁴⁰ Id., pp. 2-6.

⁴¹ In a September 21, 2018 ruling, we denied Ms. Kopald's motion to file Dr. Schoechle's belatedly proffered testimony and a similar motion by Pace Energy and Climate Center to file supplemental expert testimony. Both motions were filed months after the deadlines for filing direct and rebuttal testimony in these proceedings.

⁴² Kopald Motion 5, pp. 2-5.

In our September 20, 2018 conference, we granted DPS Staff's request that Staff not be required to file a response to Motion 5. Our September 28, 2018 ruling following the conference did not address the IRs directed to DPS Staff at issue in Motion 5. During the September 20, 2018 conference, however, Ms. Kopald received responses from DPS Staff and a DPS Staff witness about AMI cost savings in relation to the rate design, which was responsive to certain IRs at issue in Motion 5. The IRs at issue in Motion 5 are otherwise addressed in this ruling.

DISCUSSION

The scope of discovery is defined by the type of proceeding in which discovery requests are made and requests should be "tailored to the particular proceeding and commensurate with the importance of the issues to which they relate."⁴³ These are rate proceedings in which the Commission must determine whether O&R's proposed rates are just and reasonable.⁴⁴ As we noted in our September 28, 2018 ruling denying O&R's motion to strike Ms. Kopald's testimony, the issues here "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."⁴⁵ Our ruling also found that because rate design is inherently at issue in a rate case, the scope of this

⁴³ 16 NYCRR § 5.8(a).

⁴⁴ Ruling Denying O&R's Motion to Strike Testimony, p. 20.

⁴⁵ Id., p. 27.

proceeding necessarily includes the structuring and design of O&R's proposed AMI smart meter opt-out fees.⁴⁶

Our September 28 ruling defined the scope of these rate proceedings and the issues that may be raised. It expressly identified the issues that had already been determined in prior Commission proceedings and found them to be outside the scope of these proceedings. Finally, the ruling provided direction to the parties about the acceptable scope of discovery, which informs our decision here.

In terms of Ms. Kopald's IRs that inquire about the societal costs and benefits of the AMI program and the health, safety, functionality, security, and privacy issues associated with smart meters, all of these issues are outside the scope of these proceedings. Only the issue of O&R's capital costs and expenses related to the AMI program and the design of the proposed rates, including AMI costs and opt-out fees, are appropriately raised in discovery requests. As detailed below, we reject Ms. Kopald's arguments in each motion that all the IRs pose relevant, cost-related information within the scope of these proceedings. A close review of the IRs at issue reveals that, with limited exceptions, the questions asked are completely unrelated to, or are too attenuated from, the issue of costs that are to be passed on to ratepayers.

Kopald Motion 1 to Compel O&R Responses

The IRs at issue in Motion 1 include 4-16, 19, 22-24, 28-29, 31, 34-39, and 42-43. In our September 28, 2018 ruling, we required O&R to answer IRs 4 to 7. Ms. Kopald's motion to compel O&R's responses to the remaining IRs is denied.

⁴⁶ Id.

Starting with the IRs to which O&R responded or responded while preserving objections, namely IRs 16, 22-24, 28-29, 34-35, and 43, we find that the questions are not properly within the scope of these proceedings under our September 28 ruling. We believe that nothing more needs to be included in O&R's responses.

The remaining IRs at issue to which O&R simply objected without responding, specifically, IRs 8-15, 19, 36-39 and 42, all present issues previously determined by the Commission, which are outside the scope of these proceedings. Some IRs (IRs 28-29, 34-35, 42-43) ask about the health effects, safety, security, privacy, and functionality aspects of smart meters. These questions seek to revisit the Commission's initial policy decision to deploy AMI in the 2015 Rate Order, and its rejection of health, safety, privacy, and functionality issues in the AMI Expansion Order and Rehearing Order.⁴⁷ They also seek to revisit the Commission's decision in separate proceedings to approve the kind of meters O&R uses in its service territory for the AMI program.⁴⁸ We will not require O&R to respond to these IRs.

Other IRs at issue in Motion 1 ask whether O&R's use of smart meters complies with federal laws. The IRS also ask how O&R responds to allegations made in an appended declaration and in a film documentary about health effects from smart meters (IRs 8-15, 19, 31, 37-39). In addition to being outside the

⁴⁷ Cases 14-E-0493 and 14-G-0494, 2015 Rate Order, supra, n. 4; Case 17-M-0178, AMI Expansion Order, supra, n. 5, and Rehearing Order, supra, n. 6.

⁴⁸ 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).

scope of these proceedings, these IRs are improper because they involve Ms. Kopald's ultimate legal contentions and call for O&R's legal analysis or conclusions.⁴⁹ We therefore decline to compel O&R's responses to these IRs.

Kopald Motion 2 to Compel DPS Staff Responses

The IRs at issue in Motion 2 are IRs 14-15, 16(a)-(c), and 17-20 (Set 1), which we did not address in our September 28, 2018 ruling. These IRs ask about how smart meter data works with electric vehicles (IR 14); whether smart meters are secure or can be hacked (IR 17); whether AMI has reduced system losses, electricity use, and customer bills (IRs 15, 18-19); 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 about the costs associated with retrofitting (IR 16(a)-(b)); whether there is "hard data" to support O&R's contention that customer bills were reduced and customers saved money (IR 16(c)); and whether there is evidence that AMI systems can result in turning off peak loaders (IR 20). DPS Staff objected to each of these IRs on the grounds that they sought information beyond the scope of these proceedings and not reasonably calculated to lead to admissible evidence.

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

⁴⁹ See Barber v. BPS Venture, Inc., 31 A.D.3d 897 (3rd Dept. 2006) (motion to compel responses denied where questions related to ultimate legal contentions were "palpably improper"); Lobdell v. South Buffalo Ry. Co., 159 A.D.2d 958, 958 (4th Dept. 1990) (party may not be compelled to answer questions of law, nor compelled to answer questions seeking legal conclusions or to draw inferences from facts).

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. Because we required O&R's responses to IRs 72(a) and (b) in our September 28 ruling, we will similarly require DPS Staff to respond to IRs 16(a)-(b) even though O&R may be in the best position to answer. As we found in our September 28 ruling, the questions are relevant to these proceedings because they seek information about the capability and cost of retrofitting smart meters. DPS Staff should provide answers to IRs 16(a) and (b) to the extent that it has responsive information in its control, within the meaning of 16 NYCRR § 5.8(f).

As to the remaining IRs, IRs 14-15, 16(c), and 17-20, we agree with DPS Staff's objections. The issues these IRs raise were decided in the Commission's prior orders, are outside the scope of these rate proceedings, and do not address the AMI costs to be included in O&R's revenue requirement or the AMI costs that O&R seeks to recover from rate payers in these proceedings. Instead, they are directed at policy arguments about the wisdom of the Commission's approval of O&R's AMI program, particularly with respect to customer and energy savings, turning off peak generation, system functionality, reduction of system losses, use of meter data, meter security and customer privacy. These issues were addressed in the Commission's prior decisions to initially authorize and then enhance and expand O&R's AMI program. DPS Staff need not respond to the remaining IRs at issue in Motion 2.

Kopald Motion 3 to Compel O&R Responses

In our September 28 ruling, we found that O&R should answer IRs 58-69 and additionally IR 72(a) and (b) because the

questions relate to the rate design and cost issues associated with the AMI program, which are relevant to this case. The remaining IRs at issue in Motion 3, specifically, IRs 70-71, 72(c) and 73-75, seek information about how smart meters work in evaluating electric vehicles, reducing system losses, lowering customer bills, verifying demand response, or emitting radio frequency. They also ask how smart meters can be considered safe from hacking as described in a Wall Street Journal article, how O&R's demand response program works, how consumers can monitor energy consumption in the demand response program, and whether advanced meters work when power is off in a neighborhood. We note that IRs 70-71, 72(c) and 73 duplicate IRs 14-15, 16(c) and 17 that are at issue in Motion 2 directed to DPS Staff. We found those IRs to be objectionable because they request information outside the scope of these proceedings and we declined to require DPS Staff to respond.

The same rationale that we applied to IRs 14-15, 16(c) and 17 and our conclusion that DPS Staff need not respond are applicable to these IRs directed to O&R. We decline to require O&R to respond to IRs 70-71, 72(c) and 73-75 because the issues raised were decided in the Commission's prior orders to initially approve and later expand and enhance O&R's AMI program. The IRs do not address the AMI costs included in the revenue requirement at issue here.

Kopald Motion 4 to Compel O&R Responses

Our September 28 ruling found that O&R should answer IRs 85 and 86, which are at issue in Motion 4. The remaining IRs at issue, namely IRs 76-84, 87-98 (Set 4), IRs 99-100 (Set 5), and IR 101 (Set 6), reflect a general attack on the AMI program and the Commission's previous determinations. Some IRs ask O&R to explain and demonstrate with "tangible evidence" how

AMI meters are better than existing meters (IRs 76-78). Others ask about statements O&R has made in a separate proceeding involving its initial DSIP filing (IRs 79-84, 87-98).⁵⁰ Others ask about refurbishing and servicing existing analog meters (IR 99) and about how AMI meters work (IR 101). One IR asks for an affidavit documenting that AMI meters do not charge customers for electricity to run the meter (IR 100).

These issues either were resolved in the Commission's prior determinations, are the subject of the separate DSIP proceeding in which they may be aired, or are otherwise outside of the scope of these rate proceedings. For those reasons, we find that O&R need not respond to the remaining IRs at issue in Motion 4.

Kopald Motion 5 to Compel DPS Staff Responses

In our September 28, 2018 ruling, we did not address the IRs directed to DPS Staff at issue in Motion 5 (IRs 21-45) (Sets 2, 3 and 4). As noted above, Motion 5 included as exhibits DPS Staff's responses to only IRs 21-25, 27-29, and 44-45, despite seeking responses to all the IRs referenced in the motion, that is, IRs 21-45. We find the motion defective in seeking relief for IRs for which we lack evidence of DPS Staff's responses or objections. We therefore address only the IRs that are included as exhibits to Motion 5, namely, IRs 21-25, 27-29 and 44-45.

The questions posed in IRs 21-25 and 27-29 are no different than most of those at issue in Motion 2 in terms of relevance to these rate proceedings. They ask Staff to provide evidence about O&R's testimonial submissions related to AMI meters in the separate DSIP proceeding. DPS Staff objected to

⁵⁰ Case 14-M-0101, supra, n. 28.

these IRs because they duplicated IRs served on O&R, sought information related to statements O&R made, and otherwise raised issues beyond the scope of these proceedings.

We agree that these IRs are not proper. The issues raised either were resolved in the Commission's prior decisions to approve and expand the AMI program, are the subject of the separate DSIP proceeding in which they may be considered, or are otherwise outside of the scope of these rate proceedings. Furthermore, the information requested is not in DPS Staff's control within the meaning of 16 NYCRR § 5.8 because that trial team is not necessarily made up of the same agency staff members involved in the separate DSIP proceedings. Accordingly, we will not require DPS Staff to respond to IRs 21-25, and 27-29 at issue in Motion 5.

The remaining two IRs (IRs 44-45) ask DPS Staff for a list of companies approved by DPS to refurbish and service analog meters; an explanation and details of the approval process and the date when the approval process was discontinued; an explanation about why refurbished analog meters having wireless modules cannot have the modules removed and function as analog meters; all correspondence regarding refurbished analog meters; and all test results DPS has performed for the Aclara smart meters that O&R uses in its AMI program.

DPS Staff answered these questions while preserving objections and stated that "[n]o such approvals have been granted" for companies to refurbish or service analog meters or for the use of analog meters with wireless transmitting modules. DPS Staff also responded to some of the related follow up questions as "[n]ot applicable." DPS Staff also explained in its response that "hypothetically," electromechanical meters would function the same with or without a wireless module. In response to the question about Aclara meter test results, DPS

Staff's answer referred to the proceeding in which the Commission approved the Aclara meters.⁵¹

We find that DPS Staff's answers are sufficiently responsive to the questions posed even though the questions are beyond the scope of these rate proceedings. We will not require more.

CONCLUSION

For the foregoing reasons and as provided in our September 28, 2018 ruling:

- (1) Motion 1 is granted in part to compel O&R to respond to IRs 4 to 7 and is denied as to the remaining IRs, specifically, IRs 8-16, 19, 22-24, 28-29, 31, 34-39, and 42-43.
- (2) Motion 2 is granted in part to compel DPS Staff to respond to IR 16(a) and (b), and responses shall be provided within ten days of the date of this ruling; Motion 2 is denied as to the remaining IRs, specifically, IRs 14-15, 16(c), and IRs 17-20.
- (3) With respect to Motion 3 to compel O&R to respond, IRs 45-57 and IRs 58-69 will be treated as one set and will be referred to collectively as IRs 58-69. Motion 3 is granted with respect to IRs 58-69 and IR 72(a) and (b), with the clarifications and limitations set forth in our September 28, 2018 ruling. Motion 3 is denied as to the remaining IRs at issue, specifically, IRs 70-71, 72(c) and 73-75.
- (4) Motion 4 is granted to compel O&R to respond to IRs 85-86; Motion 4 is denied as to the remaining IRs, specifically, IRs 76-84, 87-101.

⁵¹ Cases 16-E-0242 and 16-E-0366, supra, n. 48.

(5) Motion 5 to compel DPS Staff to respond to IRs 21-25,
27-29, and 44-45 is denied.

(SIGNED)

MAUREEN F. LEARY

(SIGNED)

DAKIN D. LECAKES