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.

PROTECT ORANGE COUNTY'S RESPONSE SUPPORTING THE MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM UPON THE ACLARA COMPANIES

PRELIMINARY STATEMENT

Protect Orange County supports the instant motion. The movant has carefully articulated that a cost analysis includes consideration of depreciation rates. Protect Orange County does not support the DPS' reliance upon the 20 year number, which is not only conclusory, but runs counter to current evidence. This issue must be addressed in final briefings. Because the meter manufacturer is likely to have the most data about meter failure rates, Aclara should be made to provide this information. Furthermore, smart meters have computer-like parts which are subject to glitches and subject to interference by other factors that are articulated in this subpoena. If the meters are not billing properly, by now Aclara would know about this and would either be able to say this is happening under certain conditions some of the time and/or be able to say that here is the software or other technical fix that the utilities will have to purchase to deal with these known glitches. These costs should be accounted for before there is a rate increase because they factor into depreciation as well as potentially operations and maintenance. It is only fair to the ratepayers to have the most accurately calculated formula as possible at this time.

POINT I

THE SIGNIFICANCE OF PRE-APPROVAL FACTS VERSUS POST-APPROVAL FACTS AS IT RELATES TO THIS APPLICATION

Even if the Commission claims the question of meter accuracy in 17-M-0178 was not

enough to re-open the hearing approving the further rollout of smart meters, it refers to the issue of *compliance with FCC standards* and not to any accuracy test per se. At the same time, the Commission is permitting a review of costs. Any information that Aclara has accumulated from the sale of these meters to the Commission are relevant to calculating the depreciation schedule. The 20 year desired number is contradicted by many authorities, including the IRS in IRS Taxpayer Advice Memorandum 201244015 (Exhibit 2), and staff has not demonstrated in their testimony how prior data in their survivor curves are applicable to these specific meters. Any information about accuracy and the need to retrofit or fix is necessary to a full cost analysis of the meters. Tests before approval are not the same as post-market surveillance. FCC testing should be seen as pre-market testing- the bar by which the meters were approved. Post market testing, once something has been rolled out into the field demonstrates its efficacy in real-world conditions. In the private sector, things determined by post-market surveillance can inform the use of a product afterward; from whether directions for its use should be modified to whether some classes should not use the product at all to whether the product should be yanked by the market. The FDA does this with drugs all of the time. Just because a drug is approved does not mean that the FDA has no mechanism to recall it *ex post facto*. See esp. 2011 WL 4101960 *Draft Guidance for Industry and Food and Drug Administration Staff – Postmarket Surveillance Under Section 522 of the Federal Food, Drug and Cosmetic Act*: August 16, 2011. To say it was approved for use, so therefore any facts that come out after the approval should be ignored, would not make sense.

The equivalent argument would be if the PSC had ruled the earth was flat, but ruled that the costs of dealing with ships that fall off the face of the earth should be reviewed at the next proceeding, and at the next proceeding, information was available that the earth was round, and that ships do not run off the end of the earth, that fact would have to be acknowledged in

calculating the assumed costs of ships falling off the edge. Perhaps the number would be recalculated as ships being lost in a rare tsunami or storm in the deep ocean. The number would have to be revisited. Once it has been adduced that the earth is round, we cannot very well ignore this scientific fact. A cost adjustment should not ignore this reality. At a minimum, *de novo* review of this point could occur and certainly the standards for de novo review should be considered in a PSC hearing where orders are referred to from other cases and even other jurisdictions (for example, the CenHud case is oft referred to regarding analog meters). See esp. *Matter of Morales v Smith*, 56 Ad.2d 602 (2nd Dep't: 1977):

> Determination reducing petitioner's grant of public assistance to recoup alleged overpayment annulled, on law and matter remitted for de novo hearing and new determination --- Before any recoupment may be had, there must be proof that income of petitioner's husband was actually available for support of his stepchildren --- In addition, respondents have failed to indicate how total overpayment was computed.
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> Determination annulled, on the law, without costs or disbursements, and matter remitted to the State agency for a *de novo* hearing and a new determination in accordance herewith.

This case is clear that *de novo* review was permitted in the instance in which the agency had not addressed the issue of how an overpayment was computed. Here, the rate may not be calculated accurately without current knowledge of actual failure rates of the meters and costs to fix any interference issues that affect overbilling. Also, no standard that respects the nature of the smart meter compared to the old meters (which did not operate as mini-computers, and hence were not subject to the same interference and breakdown forces) has been put forth and no standard has been put forth as to when or how the Commission and/or DPS plans to re-assess changing depreciation rates. Are they waiting for evidence in the field from this jurisdiction only? Are they waiting for someone to initiate a new proceeding? Are they waiting for the next rate case? When do they think that information will be available? Why should it be squelched when it is

available now? It is Protect Orange County's contention that it should be done during this rate case.

Further to this point, in *Clermont York Associates v. Lynch*, 271 A.D.2d 262 (1st Dep't: 2000), evidence that could not have been available during the first hearing was subject to consideration at a de novo review:

> Contrary to petitioner's contentions, the Commissioner was not precluded from considering de novo the new evidence concerning the façade collapse, which could not have been submitted with the tenants' PARs, and revocation of the MCI rent increase, rather than its suspensions, was completely warranted on the instant facts.

Here the façade collapse is an event that occurred after the fact and it is tantamount to our analogy regarding late discovery that the earth truly is not flat.

Protect Orange County's point is two-fold*; there is nothing in the orders that prevents the addressing of cost issues that also relate to meter performance*; indeed where facts have developed regarding meter performance, they must be considered in a cost review that includes depreciation and the costs of any fixes to address any defects, deficiencies or idiosyncrasies (if so termed) of the meters' performance in the field; and also, where there has been no ruling addressing this issue, it is still ripe for consideration.

Inasmuch as Aclara will be opposing this motion, presumably, since they asked for an extension to respond, they should have no objection to showing any information that shows any problems with the product as well as retrofits to address the issues. Their wares are sold to entities that are publicly regulated, and this information is relevant to the public. If there is something that has manifested since they were approved or any other facts that they have that can shed light on the issues requested, which ultimately bear upon costs, they should be revealed as they are relevant to the ratepayers' interests.

POINT II

THE INFORMATION ACLARA HAS PROVIDED DOES NOT ADDRESS THE CURRENT STATUS OF ACCURACY AND METER BILLING.

The UL LLC Meter Performance Compliance Report of August 31, 2016, which was submitted in Case 16-E-0242 (as well as the November 10, 2016 report submitted in Case 16-E-0366) refers to a magnetic field test but it does not encompass a test of high frequency transients above 60 hertz frequency of the type emitted by dimmer switches. In any event, the Leferink study was issued after the ruling approving use of these meters, and should be seen as something that falls within the ambit of post-market surveillance. This information is critical to assessing any costs related to billing issues. Any retrofits needed to correct overbilling from this problem should be calculated when determining expenses that affect rates. The tests do not take into account any other frequencies above 60 hertz that are present in a premises and in the meter themselves. UL tests are for safety and not for accuracy. They test to see if the device will blow up or melt.

And speaking of which, even the UL tests do not test for faulty components in a supply chain that can show problems as they develop in the field. For example, the industry-funded Electric Power Research Institute ("EPRI") issued a report on the UL 2735 test, "UL 2735: Electric Utility Meter Safety Standard and Conformity Assessment" (Exhibit 1) that identifies problems with smart meters including component issues. Page 11 documents the following problems: "sustained burning/molten flaming dripping", "single component failures", "ejections/flames/accessibility to live parts", "endurance of service switches – welded contacts", "deficient electrical spacings", "supply chain control of safety critical components – compliance of production". In other words, there are problems not detected with the initial test that have been documented by the industry itself (and appear to relate to performance of sourced

components). Any data that Aclara has about performance issues and meter life issues must be presented at this time whilst costs are to be assessed pursuant to the November 16, 2017 order in 17-M-0178. UL tests are inadequate to the question of meter failures over time, and the need for fixes and obsolescence over time--- data that would only come from the field.

There is also nothing in the UL reports that could predict meter failure rates/ obsolescence that would come from field data. There is, however, data emerging from other utilities of complete meter failure. In the case of the Arizona Public Service Electric Company ("APS"), which has 1.2 million customers. 140,000 smart meters have been replaced for failure. (On information and belief this information is in APS' response to staff in Docket # E-01345A-16-0036 before the Arizona Corporation Commission, Section 9.17). Over 10% constitutes a statistically significant amount of people. Again, it is field data that is necessary to have up-to-date facts to assess

For all the reasons stated, the application to issue a subpoena to Aclara (and its various entities) should be granted.

Respectfully Submitted,

/s/ Pramilla Malick

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Minisink, NY

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