STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 16-G-0058 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of KeySpan Gas East Corporation d/b/a National Grid for Gas Service

Case 16-G-0059 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of The Brooklyn Union Gas Company d/b/a National Grid NY for Gas Service

Case 14-G-0091 – In the Matter of the Acts and Practices of The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid Regarding Billing of Each Company's SC No. 2 Customers from March 2008 to March 2014

Case 14-G-0503 – Petition for Approval, Pursuant to Public Service Law, Section 113(2), of a Proposed Allocation of Certain Tax Refunds Between KeySpan Gas East Corporation d/b/a National Grid and Ratepayers

Case 13-G-0498 – Petition for Approval, Pursuant to Public Service Law, Section 113(2), of a Proposed Allocation of Certain Tax Refunds Between KeySpan Gas East Corporation d/b/a National Grid and Ratepayers

Case 12-G-0544 – In the Matter of the Commission's Examination of The Brooklyn Union Gas Company d/b/a National Grid NY's Earnings Computation Provisions and Other Continuing Elements of the Applicable Rate Plan

Case 11-G-0601 – Petition for Approval, Pursuant to Public Service Law, Section 113(2), of a Proposed Allocation of Certain Tax Refunds Between KeySpan Gas East Corporation d/b/a National Grid and Ratepayers

PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.

REPLY TO STATEMENTS IN SUPPORT OF THE JOINT PROPOSAL

Dated: September 23, 2016

I. INTRODUCTION

On September 7, 2016, a joint proposal ("JP") in the above-captioned cases was signed and filed by the Brooklyn Union Gas Company d/b/a National Grid NY ("KEDNY") and KeySpan Gas East Corporation d/b/a National Grid ("KEDLI") (collectively, the "Companies"), Department of Public Service Staff ("DPS Staff"), the City of New York, Environmental Defense Fund, BBPC, LLC d/b/a Great Eastern Energy, Direct Energy Services, LLC, Consumer Power Advocates, Estates NY Real Estate Services LLC, and Spring Creek Towers memorializing a negotiated settlement with respect to the Companies' filed tariff leaves and supporting testimony and exhibits for new rates and charges for gas service to be effective January 1, 2017.

Per the *Notice of Procedural Conference* issued August 29, 2016 and the *Ruling on Schedule for Consideration of Joint Proposal* issued on September 13, 2016, parties were directed to file Statements in Support or Opposition to the JP by September 16, 2016 and Reply Statements to Statements in Support or Opposition to the JP by September 23, 2016. With the exception of Direct Energy Services, LLC, all signatory parties filed Statements in Support of the Joint Proposal. Long Island Power Authority and the Utility Intervention Unit of the New York State Department of State's Division of Consumer Protection (UIU), neither signed nor opposed the JP. UIU filed comments on September 16th focused on exponentially rising levels of expenditures pertaining to the Companies' obligations regarding investigation and remediation of Superfund sites. Additionally, four entities filed Statements in Opposition to the JP, including the Public Utility Law Project ("PULP"). URAC filed a Statement in Opposition to the JP on September 9, 2016. Potomac Economics, LTD and Town of Brookhaven also filed Statements in Opposition to the JP on September 19, 2016 and September 21, 2016, respectively.[1]

PULP hereby submits this Reply Statement in Opposition to the JP to respond to arguments set forth in statements made by Statements in Support of the JP. This Reply addresses each Statement in Support as necessary; any omission of issues addressed in the JP should not be construed as PULP's support of or acquiescence to those terms.

[1] Potomac's request for party status is under review. PULP has no objections to Potomac's request for party status, or to the late filings of Potomac and Town of Brookhaven.

II. SUMMARY OF PULP'S REPLY STATEMENT

Given the Public Service Commission's statutory authority to review, and approve (with or without modification) only settlement agreements that are just and reasonable and in the public interest, PULP reasserts our objections to the JP as stated in our Statement in Opposition, and in this Reply Statement, reviews the reasons why the settling parties have failed to meet their burden of proof, both individually and collectively, under 16 NYCRR Section 61.1 and the Commission's 1992 Revised Procedural Guidelines for Settlements in the context of these objections. For the foregoing reasons, therefore, we reassert our opposition to the JP, or alternatively, recommend conditional approval upon certain modifications, as further explained in our initial Statement of Opposition previously filed.

III. STANDARD OF REVIEW

The Commission's 1992 Revised Procedural Guidelines for Settlements require settlement proposals concerning major rate increases to be "supported by documentation of the quality and detail required for major rate case filings…[which] shall include the relevant information discussed in Part 61 of the Commission's Rules of Procedure, 16 NYCRR."[2] Therefore, in keeping with the requirements in Part 61, proponents of a settlement proposal carry the burden of proof to justify that its rates, rules and regulations are just and reasonable;[3] and to support any expected changes in revenues, expenses, or income with data that is neither speculative nor conjectural and is accompanied by detailed explanations for all estimates.[4]

As explained in the Commission's Order Revising Settlement Procedures explaining the revisions to the 1992 Revised Procedural Guidelines for Settlements and the newly-added section 2.6 of 16 NYCRR[5] relating to settlement procedure, the Commission declined to codify that proponents must support settlements with rate case quality data because of the subjective nature of such a standard.[6] However, the Commission assumed that the "spirit" of the requirement would be followed so that "settlements that are in the public interest will be possible and will be

[2] Cases 90-M-0225 and 92-M-0138, *Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines*, Opinion No. 92-2 (issued March 24, 1992), at 22.
[3] 16 NYCRR § 61.1 - §6.3; also see, 92-M-0138, 1992 revised Procedural Guidelines, Section E, pg.5.
[4] 16 NYCRR § 61.4.
[5] Section 2.6 was later renumbered to be 3.9 on 9/19/92.
[6] 1992 Order Revising Settlement Procedures, at 22. The new Section 2.6 of 16 NYCRR and the 1983 Procedural Guidelines for Settlements were revised effective April 15, 1992 and attached as appendices to the Order.

based upon a record that demonstrably justifies the result."[7] With that in mind, although the rule is not codified in 16 NYCRR, the 1992 Revised Procedural Guidelines for Settlements specify that proponents of a proposed settlement place in the record the "details of the agreement, and a statement or testimony in support, which should contain its underlying rationale and how the settlement of issues compares both to its litigating position and what it regards as the likely outcome of litigation."[8]

Assuming the proponents of the proposed settlement meet this burden, the Commission typically evaluates the JP against certain factors including:

> "(1) the settlement's consistency with law and with the regulatory, economic, social, and environmental policies of the Commission and the State; (2) whether the result compares favorably with the likely result of full litigation and is within the range of reasonable outcomes; (3) whether the settlement strikes a fair balance among the interests of ratepayers and investors and the long-term soundness of the utility; (4) the existence of a rational basis for decision; (5) the completeness of the record; and (6) whether the settlement is contested.[9]
>
> The first four of the foregoing factors are themselves elements of the public interest standard. The fifth and sixth, in contrast, simply guide us in our assessment. We would give weight, for example, to the fact that a settlement has been agreed to by all parties, including normally adversarial ones, but the absence of objection would not relieve us of our obligation to form an independent judgment that the settlement is in the public interest. Similarly, the less developed the record, the greater the burden on the settlement's proponents to show that the result compares favorably to the likely result of full litigation."[10]

IV. COMPLETENESS OF THE RECORD (FACTOR 5)

A. Review of Intervenor Statements in Support

There are ten signatories to the proposed JP, including the Companies, and DPS Staff. As stated above, the 1992 Revised Procedural Guidelines for Settlements require proponents of a proposed settlement to place in the record the "details of the agreement, and a statement or testimony in support, which should contain its underlying rationale and how the settlement of issues compares both to its litigating position and what it regards as the likely outcome of litigation."[11] This is a requirement applicable to all individual proponents of a proposed

[7] *Id*. ("Of course, close attention to compliance with the spirit of this requirement must be accorded by all involved in the settlement process.")
[8] 92-M-0138, 1992 revised Procedural Guidelines, Section E, pg.6.
[9] *Id.* at 30.
[10] *Id.*
[11] 92-M-0138, 1992 revised Procedural Guidelines, Section E, pg.6.

settlement; there is no rule or case law indicating that one or more of the settling parties can meet these requirements by piggybacking on the statements of support of other parties. Respectfully, PULP is of the opinion that the majority of settling parties fail in their Statements in Support to meet their burden of proof because the content of their Statements in Support of the JP do not contain the party's "underlying rationale" or explanation of "how the settlement of issues compares both to its litigating position and what it regards as the likely outcome of litigation."

- City of New York

The City of New York submitted an eighteen-page statement focused on the issues of greatest importance to the City but infers no lack of support for all issues resolved in JP.[12] The City's Statement of Support is the most comprehensive of all the statements filed by signatory intervenors, and engages in some detailed discussion of its main issues, such as Storm Hardening and Resiliency, Low Income Programs, Revenue Allocation and Rate Design, Non-Firm Rate Design, Depreciation, Capital Expenditures, Service Quality, Data Sharing and Benchmarking, and SIR Expenses, and appropriately makes references and comparisons to its filed testimony. However, the City makes conclusory assertions that the resolution of such issues "reflects a balancing of the litigated positions", or "within the range of reasonable outcomes" or "represent a fair result compared to potential litigated outcome" without actually explaining what it regards as the likely outcome of litigation. This is not just an exercise in semantics. The City put forth a number of arguments in its filed testimony, and the proposed terms of the JP incorporate many of those recommendations made by the City. Therefore, it is important for the City to justify, and not for the Commission to assume, that the City would not have been able to achieve those results in contested litigation.

- Consumer Power Advocates

CPA submitted its statement in the form of a three-page letter addressed to the Secretary of the Commission, which applauds certain terms of the JP as they represent "important steps towards the achievement of REV goals" but the letter does not explain CPA's underlying rationale for agreeing to settlement terms against the rationale of its original litigating position; nor does it draw any comparisons as to how its key interests have achieved a more favorable outcome in the proposed settlement than what might have been the outcome of litigation. CPA

[12] City of New York, Statement in Support of JP, fn 3.

only concludes, without any explanation, that "CPA believes that the JP is in the best interests of its members, and superior to our expectation of the result of any settlement of these cases"[13] and then, recites these "interests" without any reference to its original litigating position or the outcome of litigation.

- Direct Energy Services, LLC

Although a signatory to the JP, Direct Energy Services, LLC failed to submit a letter of support of the JP as required by the Commission's rules.

- Environmental Defense Fund

EDF submitted an eight-page Statement in Support defending the proposed JP on the basis that the "Companies agreed to adopt certain procedures relating to their leak abatement efforts and LPP replacement programs,"[14] key concerns for EDF. However, EDF also fails to make specific reference to its filed testimony, nor does it explain how the proposed terms of the proposed JP would compare to a litigated outcome. For example, EDF cites to terms of the JP in which the "Companies also agreed to work with EDF to develop methane leak pilot programs at no cost to ratepayers"[15] but later acknowledges that "National Grid and EDF previously worked together to map the frequency and relative size of methane leaks on National Grid's gas distribution systems in Boston and Staten Island."[16] Based on the on-going cooperative relationship between EDF and National Grid, it is unclear, in the absence of explanation, why EDF considers further collaboration in the context of this rate case an unattainable goal unless negotiated.

- Estates NY Real Estate Services LLC

Estates' three-page Statement of Support is in the form of a letter and defends the proposed JP on the basis that the parties' agreed to discuss the potential addition of a new-dual-fuel firm service classification in a TC/Non-Firm Service Collaborative. While Estates asserts that the "creation of a new dual-fuel firm service classification…will bring important benefits to the Company's gas distribution system and its customer,"[17] Estates fails to explain how the promise of that collaborative compares to its filed testimony, or how the results of the proposed

[13] CPA Statement in Support of JP, pg. 2.
[14] EDF Statement in Support, pg. 5.
[15] *Id.* at 6.
[16] *Id.* at 7.
[17] Estates' Statement in Support, pg. 2.

JP, including the promised collaborative, compares to what could have been achieved in a litigated case.

- Great Eastern Energy

In its two-page Statement of Support submitted in letter form to the Commission Secretary, GEE defends its support for the JP on the basis that it includes "the establishment of a collaborative to provide a forum for ESCOs to address inequities between sales and transportation customers, a TC collaborative, and changes on how the complaints of ESCO customers are managed"[18] without explaining why those terms constitute a "reasonable settlement of the issues raised in the proceeding,"[19] or whether they compare favorably with the likely result of full litigation.

- Spring Creek Towers

SCT submitted a three-page Statement in Support in letter form to the Secretary of the Commission supporting the adoption of the JP primarily on the basis that it levelizes rate increases over the Rate Plan, ensures funding for certain environmental improvements and safety programs for an extended period, and recommends a rational cost-based revenue allocation and rate design; while still providing for "relative rate relief for distributed generation ("DG") customers".[20] Like the other intervenors, however, SCT does not compare the favored terms of JP with those of its filed testimony or what it projects could be achieved through litigation.

Reviewing these statements as a whole, the fact that collectively the intervenors have failed to meet the Commission's guidance concerning Statements in Support is likely not indicative of any flagrant disregard of the rules. Rather it points to the increasing prevalence over many years of a more relaxed approach to drafting such statements by supporting parties; so much so this practice has become customary. One possible reason for this trend is that the Commission rarely, if ever, challenges the sufficiency of Statements in Support.[21] By a plain reading of the 1992 Revised Procedural Guidelines for Settlements, however, intervenors are expected to do more to prove their support is in a specific intervenors particularized interest, and in the public interest as a whole. Since the content of settlement discussions are confidential, it is

[18] GEE Statement in Support, pg. 2.
[19] *Id.* at 1.
[20] SCT Statement of Support, pg. 2.
[21] PULP could not find an illustrative case to provide example of when a Commission has questioned the sufficiency of a party's Statement in Support.

absolutely critical that the Statements in Support of the JP contain comprehensive arguments that explain why the terms of the JP are more favorable to that of original testimony or in comparison to a litigated result. Without comprehensive statements to this effect on the record, demonstrating with particularity how the diverse interests of normally adversarial groups are aligned, then the collective support of the intervenors should have little to no bearing at all on whether or not the Commission should support the terms of the JP. Otherwise, the Commission is merely relying on conclusory attestations from which it would hope to draw a rational basis for approving the terms of a specific JP.

B. Staff Statement of Support & Companies' Statement of Support

Much like the City, in this case the Companies and Staff made an effort to comprehensively review the difference in terms of the JP against their filed testimonies; however, they too rely on conclusory statements such as claiming that the negotiated terms are more favorable than any terms that could be achieved in a contested litigation. Additionally, as explained further in Section VI below, the Statements of Support lack sufficient support to justify that certain terms of the JP are in the public interest. Throughout their Statements in Support, PULP notes, the City, Companies and DPS Staff often refer to the "resolution" of outstanding issues. Just to be clear, "resolution of issues" is not one of the six factors in the 1992 Revised Procedural Guidelines for Settlements used to guide the Commission in its review of a settlement agreement, and in fact, as the City more accurately acknowledges, not all issues were addressed in the settlement guidelines anyway.[22] Therefore, any reliance on "resolution" of issues as a reason for support of the terms of the JP should be disregarded. The "resolution" of an issue is not what matters; what matters is whether, in fact, the result of the resolution is comprehensively supported by non-conclusory arguments and testimony, would result in rates that are just and reasonable, and also sets forth policies that are in the public interest.

V. EXTENT OF OPPOSITION (FACTOR 6)

PULP is the only opposing party that has both been active throughout the course of settlement negotiations, and also filed a comprehensive Statement in Opposition to the JP. Based on a review of the Commission's recent decisions in settled rate cases with opposition, the

[22] City Statement in Support of JP, fn 6.

Commission has been persuaded when there's majority support for a settlement agreement. It should not in this case. PULP implores the Commission to review the terms of the JP with deference to the 1992 Revised Procedural Guidelines for Settlements, as thoroughly discussed in other parts of this Reply Statement, and to discredit any "weight" it would normally assign to consensus by normally adversarial parties against their collective failure to meet their burden of proof, as explained in this Reply. In fact, it is rare indeed for parties who are not "normally adversarial" to file a rate case settlement agreement with the Commission. From one perspective, then, this JP is nothing special in that regard. From another perspective, however, this JP fails the "normally adversarial" test because the two parties whose primary focus is advocacy on behalf of residential ratepayers (PULP and UIU), and, consequently, frequently find themselves in opposition to the positions of DPS Staff, utilities, large government, and industrial and commercial ratepayers, do not support this JP.

VI. PUBLIC INTEREST STANDARD (FACTORS 1 – 4)

Notwithstanding the record with which the Commission is provided, and the apparent agreement of "normally adverse" parties, the Commission must make a determination based on independent evaluation that the recommendations contained in the JP are in the public interest. Whether or not the Commission is inclined to agree with PULP that the record is lacking appropriate support for the proposed JP, and that the terms of the JP are not in the public interest, PULP appreciates that a determination of the Commission that the settlement terms are consistent with law and with the regulatory, economic, social, and environmental policies of the Commission and the State (Factor 1) would not necessarily be found to be arbitrary and capricious. However, PULP cannot conclude the same of Factors 2 – 4. A Commission determination that the proposed settlement result compares favorably with the likely result of full litigation and is within the range of reasonable outcomes (Factor 2) necessarily must be based on Statements in Support, and the underlying record, that demonstrate such. Likewise, the Commission cannot possibly determine whether the settlement strikes a fair balance among the interests of ratepayers and investors and the long-term soundness of the utility (Factor 3) based just on the conclusory claims of the settling parties. If all that is required is consensus to satisfy Factor 3, how then is Factor 3 different from Factor 6? Finally, the Commission cannot possibly support a rational basis for deciding in favor of proposed JP on the basis of a record that does not

comport with the 1992 Revised Procedural Guidelines for Settlements, and mere consensus does not necessarily suggest rationalization.

A. Settling Parties Failed to Meet Their Burden of Proof

The burden of proof is on the proponents of a settling case to demonstrate that the proposed settlement is in the public interest. PULP is concerned by a recent Commission Order that seems to misplace that burden and raises the issue in this Reply Statement in the hopes of preventing any such misapplication in this case. In Case 15-E-0283, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service,* Order Approving Electric and Gas Rate Plans in Accord with Joint Proposal (issued June 15, 2016), the Commission, in its evaluation of the terms of the proposed JP against the public interest standard, was "disinclined to tamper with the interrelated compromises negotiated by the parties in the absence of a demonstration that a provision of the agreement is inconsistent with sound policy, outside the range of likely litigated contested outcomes, or inimical to the protection of ratepayers, fairness to investors, or the long-term viability of the Companies."[23] First, PULP takes issue with the Commission's emphasis of consensus. The extent of opposition is a distinct factor from that of the four factors evaluated in determining whether the proposed settlement is in the public interest. Second, the Commission's use of the word "demonstration" seems to imply some other entity – perhaps public comments, or opposing party, or the Commission itself – is responsible for providing sufficient evidence to thwart a proposed JP that has full support by the majority of parties.

Presumably, testimony and evidence provided at the evidentiary hearing could repair the deficiency of the filed Statements in Support of the JP, but as a practical matter, it does not seem likely, given the parameters of the proposed evidentiary hearing schedule, the custom for expeditious cross examination, and the absence of post-evidentiary briefs. Even if it could be practically achieved, it is neither the job of the opposing parties, nor the ALJ, to treat cross-examination as an exercise in helping proponents of a settlement proposal meet their burden of proof. Furthermore, cross examination would be more meaningful if opposing parties, and the ALJ, had sufficient Statements in Support to the JP, and/or testimony, that provided the required

[23] Cases 15-E-0283 *et. al*, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service*, Order Approving Electric and Gas Rate Plans in Accord with Joint Proposal (issued June 15, 2016), at pg. 25.

underlying rationale for each party's commitment to sign, and a reasoned analysis based on the party's comparative explanation of its original position and what it suspects would be the result of litigation.

As it stands however, PULP, and the other opposing parties, are in the awkward position of picking apart an inadequately supported JP, through cross-examination of hostile witnesses, with the goal of achieving better results that are truly within the public interest. A discussion of some of PULP's key concerns follows.

B. Full Reconciliation of SIR Charges and Surcharges Assumed without Non-Speculative Explanation for Changes in Revenues, Expenses, or Income

As a threshold matter, PULP takes issue with the terms of the JP on the issue of SIR costs on the basis that the forecasted SIR costs associated with the Gowanus Canal and Newtown Creek sites are not included in the base rate allowance and therefore, any expected change in revenues, expenses, or income is erroneously supported with speculative or conjectural data, and without the proper detailed explanation for all estimates, as required by law.[24]

Second, PULP takes issue with DPS Staff using its criticism of PULP's supposed lack of certain consideration to supplant an adequate explanation with rationale for why sharing of SIR costs is not appropriate in this rate case, DPS Staff states:

> PULP has not demonstrated any particular circumstances, such as a failure to follow best practices or irregularities in the Companies' bidding processes, that warrant requiring KEDNY and KEDLI's shareholders to bear 20% of future SIR costs. Further, PULP has not considered the potential detrimental impacts of its proposal on the Companies' financial conditions, the raising of utility capital, and the potential impacts on their credit ratings.[25]

Since PULP is not a signatory party, it does not bear the burden of demonstrating anything. Therefore, whether or not the Commission is unpersuaded by PULP's evidence on the record arguing for the sharing of SIR costs, does not preclude the Commission from making its own determination that a just and reasonable settlement agreement should include such sharing. PULP stands by its arguments made thus far on this issue, which not only cite to Commission precedent, but to several policy reasons in support of requiring SIR costs to be shared with

[24] 16 NYCRR § 61.4.
[25] DPS Staff Statement in Support of JP, pg. 42.

shareholders. DPS Staff's statement would have been more compelling if it had demonstrated, based on the record, or its own analysis, that actual "potential detrimental impacts" are likely to occur if SIR costs were to be shared, or demonstrating how those impacts outweigh the benefits to ratepayers of sharing these costs with shareholders. Instead, DPS Staff has inaccurately asserted without legal underpinnings that PULP bears that burden.

As argued in PULP's Statement in Opposition to the JP, the fact that SIR costs associated with the Gowanus Canal and Newtown Creek sites were not included in the base rate allowance because of the Companies' and DPS Staff's concerns about uncertainty, and yet the terms of the JP allow the Company to fully reconcile these costs in the Rate Plan, without proper supporting rationale or explanation, is a compelling reason why the Commission should require shareholders to bear a portion of the SIR costs. DPS Staff has not demonstrated why it would be unreasonable in this case, in which there is such a significant rate increase and unsupported and excessive ROE, not to also require the Companies to absorb some SIR costs. DPS Staff has also not demonstrated that the Companies' credit rating would actually be harmed, just suggested it could be. Indeed, it is ironic that DPS Staff appears more concerned about the impacts of unknown SIR costs on shareholders than on ratepayers, and that such concern is tied to a rationale that creates a perverse incentive for the Companies not to avoid expenditures that could lead to uncertain impacts upon their financial health. Additionally, the fact that the Commission has approved several joint proposals with ratepayer-shareholder SIR cost sharing provisions,[26] suggests that the DPS Staff could have done a lot more to argue against including them in this proceeding.

Finally, the Companies' argument suggesting that a 2% cap SIR Recovery Surcharge would fairly protect future customers from bearing disproportionate portions of costs that may be incurred for SIR activities at Gowanus Canal and Newtown Creek,[27] is inaccurate because the inevitable costs will simply be paid over a longer timeframe, with more interest earned, and irrelevant as to whether the Companies' shareholders should bear any SIR costs in the first place. Neither DPS Staff nor the Companies explain why, in the SIR arena and especially regarding the

[26] See, e.g., Cases 09-E-0715 et al., *New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation – Rates, Order Establishing Rate Plan*, 14 (issued September 21, 2010); see also, Cases 09-E-0588, et al., *Central Hudson Gas & Electric Corporation – Rates, Order Establishing Rate Plan* (issued June 18, 2010), Appendix A, p. 16.
[27] Companies Statement in Support of JP, pg. 19.

two sites in which share of responsibility is still under negotiation, consistency with the Commission's market-oriented approach to facilitating changes in utility conduct is inferior to allowing the Companies to recover from ratepayers every cent of its expenditures.

C. DPS Staff Does Not Provide Rational Basis for Return on Equity

PULP reasserts its position from its Statement in Opposition to the JP that the proposed ROE is unsupported by any expert testimony or other evidence on the record. DPS Staff supports the negotiated ROE on the basis that it represents "a fair compromise between the Companies' position in its original filing and Staff's position in its direct testimony. Moreover, the 9.0% ROE is comparable to the ROE allowed for other major utilities operating under a Commission-approved multi-year rate plan."[28] While the Commission has recently approved multi-year rate plans with ROEs of 9.0%, the results of those decisions should have no bearing on the determination of the ROE in this case without support that such an ROE is actually warranted in this case.

DPS Staff has failed to provide an explanation with its underlying rationale explaining the reason it deviated from its original proposal for an 8.6% ROE. Staff asserts that "the difference between Staff's litigation position and the Joint Proposal reflects both corrections reflecting the Company's rebuttal testimony, as well as the benefits encompassed in the proposed three-year rate plan."[29] Generally referring to "benefits," without specification does not help explain how the increased ROE itself was an even trade for those "benefits," nor does it help explain how those "benefits" were not possible achievements in the context of contested litigation that could have resulted in a lower ROE - one closer to DPS Staff's initial recommendation.

As DPS Staff accurately acknowledged, the 1992 Revised Procedural Guidelines for Settlements "explain that the Signatory Parties' burden to show the agreement compares favorably with a litigated result increases when the record is less developed."[30] Supporting the increased ROE of 9.0% on the basis that "it reflects allowances for the Companies' acceptance of some terms that tend to increase their potential risk exposure and recognizes the increased

[28] DPS Staff Statement in Support of JP, pg. 9.
[29] *Id.* at 13.
[30] *Id.* at 7, citing to 92-M-0138, 1992 revised Procedural Guidelines (issued March 24, 1992) at 30.

financial risk inherent in setting rates for more than one rate year"[31] does not sufficiently explain DPS Staff's underlying rationale for supporting the higher ROE especially in light of DPS Staff's reasoned argument against the Company's increased potential risk exposure because ratemaking in NY includes unique mechanisms, such as a fully forecasted test year, revenue decoupling mechanism, full pass through of commodity costs, true-ups of short term debt, and reconciliations of uncontrollable costs, that mitigate against financial risk to utilities; and the vertically integrated nature of this state's utilities make them have a lower business risk profile.[32]

D. No Rational Explanation for Positive-Only Termination and Uncollectible Incentives

PULP reasserts its position from its Statement in Opposition to the JP that the proposed positive-only termination and uncollectible incentives mechanism has no rational basis, and must not be allowed before we can be certain that the Companies are in compliance with HEFPA before account terminations occur. PULP also reasserts its opposition to the positive incentive mechanism on the basis that there is no symmetrical negative incentive.

In its Statement in Support of the JP, DPS Staff inappropriately focuses on the claimed inadequacy of PULP's testimony to defend its rationale for allowing for positive-only termination and uncollectible incentive mechanisms. DPS Staff could have, and should have, defended the terms of the JP with its own analysis, especially since it proposed in its pre-filed testimony a mechanism that included negative incentives. Nevertheless, PULP provided ample testimony supporting why it is only logical for the Commission to establish an independent working group to audit the Companies' Home Energy Fair Practices Act ("HEFPA") compliance and residential terminations prior to awarding positive-only termination and uncollectible incentives. But, now, in the context of this proposed settlement, PULP bears no burden worth the Commission's consideration. Indeed, the fact that DPS Staff cannot argue against PULP's recommendations with its own reasoned analysis underscores that DPS Staff has not actually shown that positive-only incentives in this customer service area are justified. Instead, DPS Staff rests its position on this sweeping generalization: "Excessive use of service terminations as a credit and collections tool may jeopardize the health, safety and welfare of New Yorkers and

[31] *Id.* at 30.
[32] Qadir, Staff Direct Testimony, pg. 17, lines 11-24.

high uncollectibles contribute to higher ratepayer costs; this incentive will help to alleviate such risks and expense and should be adopted."[33] This conclusory statement, without support, is an inadequate explanation in light of the fact that DPS Staff also reversed its position on negative revenue adjustments without any explanation at all. As to be expected, the Companies offered no comprehensive explanation for supporting these proposed terms of the JP.[34]

E. Rate Design Not in Public Interest

As discussed at length in PULP's Statement in Opposition, rate designs based on high fixed basic service charges and flat and declining block rates for delivery service create affordability problems for low income customers, and act as a disincentive to conservation and energy efficiency initiatives. The terms of this JP include agreement to collaborate upon and discuss future rate design, but there is no support in the record that explains why those conversations couldn't have occurred and been resolved in the present, so that new rate design features could be implemented right now to better protect ratepayers while also protecting the interest of investors. Instead, the current high fixed basic service charges remain unchanged for heating customers, and are slated to be increased for non-heating customers; while penultimate and tail block volumetric rates are increased by equal percentages to effectuate the same steeply declining block rate design.

F. No Rational Basis for Inflated Earnings Sharing Mechanism

PULP reasserts its position from its Statement in Opposition to the JP that the proposed earnings sharing mechanisms ("ESM") unreasonably favor the Companies' interests as opposed to balancing them against the interests of the consumers and lacks evidentiary support demonstrating why the Companies should receive a more favorable ESM in this rate case than in the previous Niagara Mohawk case.[35]

[33] DPS Statement in Support of JP, pg. 54. This statement is also word for word the exact supporting statement DPS Staff used in Case 15-E-0283, et al, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service*, Staff Statement in Support of Joint Proposal (March 11, 2016) at pg. 57. The Commission should not approve JPs that contain recycled conclusory statements in support from one case to another when DPS Staff doesn't also justify those statements with analysis keyed to that particular case why that same conclusion has identical effect.

[34] Companies Statement in Support of JP, pg.8 ("Through positive incentives, the JP also encourages KEDNY and KEDLI to identify and implement new measures to reduce residential service terminations for non-payment while decreasing or maintaining the level of bad debt from residential accounts.")

[35] Cases 12-E-0201 & 12-G-0202, *Niagara Mohawk-Electric and Gas Rates*, Joint Proposal (filed December 7, 2012), pp. 25-26.

VII. REASSERTION OF SUGGESTED MODIFICATIONS

The Commission should reject, or in the alternative modify, the proposed Joint Proposal because key elements are not in the public interest as argued above. For the sake of completeness and convenience, PULP reasserts here its suggested modifications previously argued in its Statement in Opposition to the JP.

A. Fair ROE and ESM Based on Hearing Record

Savings from a lowered ROE and ESM could result in a significant reduction of rates, and customer bills, in the Rate Plan. In the absence of evidence on the issue, the ALJs should make their independent recommendation of a fair ROE and ESM based on the evidence at the upcoming hearing. Given the RDM and other reconciliation mechanisms, and other cost items, the Companies' risks are sufficiently lowered as to obviate the need for risk hedging through increases to the ROE and ESM, and its ROE should reflect that lower risk.

B. Companies to Share in SIR Costs

Consistent with the findings of the Commission's SIR Order, PULP believes, at a bare minimum, that the rate plan resulting from this proceeding should contain an ESM that provides for use of all excess earnings to pay down SIR costs, just as the Commission approved in several utility joint proposals previously.[36] More importantly, it is inconceivable that the JP does not include any type of market-based inducement for the Companies to overcome their business-as-usual inertia and strenuously advocate to lower their SIR expenses. Nor is there any inducement in the JP to overcome a problem with New York's regulatory regime that allows shareholders to earn a return on SIR expenses. Accordingly, to repair this fatal flaw in the JP, the Commission should require to shareholders to absorb at least 15% of SIR expenses. Only a "market-oriented" technique would align the Companies' interests with ratepayers' interests.[37]

C. Reconsideration of Rate Design

As noted above, substantial financial and environmental benefits could be captured by ratepayers and investors if the JP's declining block rate design were replaced by an inclining

[36] Cases 13-E-0030 *et al*., Order Approving Electric, Gas and Steam Rate Plans in Accord with Joint Proposal 26-27 (February 21, 2014); Cases 09-E-0715 *et al., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation – Rates*, Order Establishing Rate Plan, 14 (issued September 21, 2010); Cases 09-E-0588, *et al*., *Central Hudson Gas & Electric Corporation – Rates*, Order Establishing Rate Plan (issued June 18, 2010), Appendix A, p. 16.

[37] See, generally, Case 14-M-0101, *supra*, Order Adopting a Ratemaking and Utility Revenue Model Policy Framework (issued May 19, 2016).

block rate. On the ratepayer side, customer bill impacts and per unit rates would be more reflective of how much energy they consumed. This could lead consumers at all levels to conserve more energy and reduce bill sizes, both important public policy objectives of the Commission and of the Governor. On the investor side, no revenue would be lost as the cost of delivery would merely be redistributed across different energy blocks and the need for long-term low income assistance programs would decrease as bills for low income and/or low usage customers would decrease. In summary, the JP ignores rate design features that could better protect ratepayers while also protecting the interest of investors. Any rate change approved by the Commission must correct this flaw.

D. Incentive Mechanism

As suggested in Yates' rebuttal testimony, the Commission should establish an independent working group with the authority to (a) audit all of KEDNY's accounts "Eligible for Field Action" as of December 31, 2015 and terminations from January 1, 2016 to the present; and (b) audit all of KEDLI's residential terminations from January 1, 2014 through the present. These audits would help ensure the Companies' are in compliance with HEFPA; in particular, whether customers are provided with the opportunity to negotiate and execute affordable DPAs. This auditing could be used to determine an appropriate annual level of terminations upon which to assess future performance. Since, the JP already contemplates that KEDLI performance metrics will be set at a future date after discussion among Companies, Staff and interested parties, PULP suggests that at the very least, an audit on KEDLI's terminations be performed as part of the discussions that are set to occur in March of next year.

VIII. CONCLUSION

While the Commission can be deferential to settlements agreed upon by normally adversarial parties, that deference is not without limits. To the extent that a party supporting the JP does not provide any rationale including a comparison of its litigating position with the likely outcome of litigation, then, the proposed settlement is deficient and is inconsistent with the "spirit" of the 1992 Revised Procedural Guidelines for Settlements, which contemplates that "settlements that are in the public interest will be possible and will be based upon a record that

demonstrably justifies the result."[38] The Joint Proposal in Cases 16-G-0058 and 16-G-0059 therefore should not be approved because the terms are not adequately supported by any of the Statements in Support of the JP filed by the signatories. Quite simply, the signatories did not meet their legal burdens. Furthermore, if the JP was approved without PULP's modifications, PULP argues that the resulting rates would not be just and reasonable, and the resulting policies and programs would not be in the public interest.

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Respectfully submitted,

/s/

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[38] Cases 90-M-0225 and 92-M-0138, *Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines*, Opinion No. 92-2 (issued March 24, 1992), at 22.