

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Petition Requesting Initiation of a Proceeding to Examine a Proposal for Continued Operation of the R.E. Ginna Nuclear Power Plant, LLC. – Petition of Rochester Gas and Electric Corporation for a Temporary Rate Surcharge.	Case 14-E-0270
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**INITIAL BRIEF OF THE
UTILITY INTERVENTION UNIT
REGARDING TEMPORARY RATES**

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INTRODUCTION

This proceeding concerns a petition by Rochester Gas & Electric Corporation (“RG&E”) for a temporary rate surcharge pending the outcome of Case 14-E-0270, *Petition Requesting Initiation of a Proceeding to Examine a Proposal for Continued Operation of the R.E. Ginna Nuclear Power Plant, LLC*. That underlying case concerns a Reliability Support Services Agreement (“RSSA”) between RG&E and R.E. Ginna Nuclear Power Plant, LLC (“Ginna”). The RSSA is currently under review at both the Federal Energy Regulatory Commission (“FERC”) and the Public Service Commission (“Commission”). By Ruling issued May 14, 2014, Administrative Law Judges Prestemon and Mullany determined that this proceeding is a rate case, and RG&E has the burden of demonstrating that the rate increases associated with the RSSA are just and reasonable. RG&E has not met this burden to date; the terms of the RSSA, and the method by which RG&E might recover RSSA-related costs, remain under ongoing administrative review and are subject to change. Nevertheless, on June 4, 2015, RG&E filed a petition asking the Commission to implement a temporary surcharge under Public Service Law (“PSL”) Section 72 to begin collecting from ratepayers money equal to the costs that RG&E might incur should the Commission and FERC both approve the RSSA

in full. RG&E further requests that this surcharge be adopted on an emergency basis under State Administrative Procedures Act (“SAPA”) Section 202(6).

The Commission should deny RG&E’s petition. RG&E has not demonstrated that the rate surcharge it requests would serve the public interest as required under PSL § 72 and SAPA.¹ Indeed, the facts established through discovery suggest that the public interest militates strongly against such a surcharge. As discussed below, RG&E’s ratepayers are already economically overstressed; to impose an additional expense on them would cause significant, concrete, and immediate harm. In contrast, the sole potential detriment that RG&E alleges would be avoided by imposing the surcharge – rate compression – is speculative, poorly supported, easily avoided, and of RG&E’s own making.

DISCUSSION

I. A RATE INCREASE WOULD CAUSE SIGNIFICANT, IMMEDIATE HARM TO RATEPAYERS.

RG&E’s requested surcharge would impose rate increases of up to 40% or more, with monthly bill impacts several times larger than those that would result under RG&E’s recently-proposed rate filing in Cases 15-E-0285 and 15-G-0286.² This major expense on customers represents both an indispensable component of the public interest³ and a consideration that RG&E has neglected entirely.

The effects of a major rate hike would be particularly acute in RG&E’s service territory. As of 2013, fully a third of households in RG&E’s service territory earn less

¹ N.Y. Pub. Serv. L. § 72 (the Commission may only authorize a temporary rate surcharge “[i]f it shall be made to appear to the satisfaction of the commission that *the public interest requires a change in the price of gas or electricity* charged by any such person or corporation, or that such change is necessary for the purpose of providing adequate and efficient service, or for the preservation of the property”) (*emphasis added*); N.Y. State Adm. Proc. L. § 202(6) (allowing emergency rule adoption only “if an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare *and that compliance with the requirements of subdivision one of this section would be contrary to the public interest*”) (*emphasis added*).

² For example, a residential customer using 600 kWh per month would see a bill increase of 4.2% under the RSSA, whereas RG&E’s proposed rates in case 15-E-0285 would decrease that customer’s bill by about 1.4%. See RG&E Response to DPS Staff Information Request No. 2.

³ The “public interest” in rate matters includes consideration of, *inter alia*, the burden on customers. See *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 354-55 (1956).

than \$35,000 per year.⁴ About 44,000 households, or 12%, are on deferred collection agreements,⁵ and uncollectable expenses have risen over recent years to a peak in 2014.⁶ RG&E's Collection Activity Reports reveal that between approximately 43,000 and 52,000 termination notices were sent by RG&E to its customers during each of the months of May 2011 to 2015.⁷ Lower-income ratepayers who live paycheck-to-paycheck should not be compelled to simply absorb a new expense today in order to offset the possibility that they may have to pay it later. To impose this requested surcharge would thus inflict substantial financial harm on RG&E's ratepayers.

Rather than examine its ratepayers' ability to absorb a major rate increase, RG&E chose to ignore the matter entirely. RG&E admitted at evidentiary hearing that it has not analyzed the impacts of the surcharge on its ratepayers when preparing and filing its petition⁸ – in essence, RG&E argues that the surcharge serves the public interest without actually examining the effects it would have on the public. This failure alone is sufficient to demonstrate that RG&E has not met its burden of proving that the surcharge is appropriate.

II. IT WOULD BE PREMATURE TO RECOVER HYPOTHETICAL RSSA-RELATED COSTS.

The foundation upon which RG&E's petition rests – that the requested surcharge would recover costs that might eventually result from the RSSA – is far too uncertain to support such an extraordinary measure as temporary rates.

First, the RSSA is not in effect. Neither the Commission nor FERC have reached a final conclusion to accept the RSSA, so RG&E has not, and might never, incur any financial obligations to Ginna under the RSSA. Furthermore, per the extant RSSA's terms, either party might still unilaterally withdraw from the agreement by August 1,

⁴ U.S. Census Bureau, *American Community Survey* (2013).

⁵ Cases 15-E-0283, 15-E-0285, 15-G-0284, and 15-G-0286, RG&E Response to UIU Information Request No. 15.

⁶ Cases 15-E-0283, 15-E-0285, 15-G-0284, and 15-G-0286, Direct Testimony of the Revenue Requirement Panel at 32.

⁷ Collection Activity Reports are routinely filed with DPS Staff by the utilities but are not posted on DMM.

⁸ Case 14-E-0270, Testimony of RG&E Panel at Evidentiary Hearing (July 2, 2015) at 70-73.

2015.⁹ The surcharge would therefore collect funds from ratepayers that are not, and may never be, due to Ginna.

Second, RG&E's petition inappropriately relies on the assumption that any RSSA that does eventually take effect will be materially identical to the one currently before the Commission and FERC. However, both the Commission and FERC have explicitly declined to approve the terms of the filed RSSA that would serve as the basis of the surcharge.¹⁰ The RSSA therefore remains under active review, and is the subject of robust settlement discussions at FERC and the Commission. Given the strong opposition to this RSSA from generators, consumer advocates, and other parties, and the Administrative Law Judges' demonstrated interest in examining the RSSA, it is likely that the terms of any approved RSSA will differ significantly from those needed to justify the amount of this requested surcharge.

III. NO SURCHARGE IS NECESSARY TO AVOID RATE COMPRESSION.

RG&E's petition does not establish that rate compression resulting from retroactive collection of RSSA-related costs would occur. Rate compression can only occur if the final RSSA includes an effective date earlier than its date of approval by the Commission and FERC, and if it also allows for retroactive collection of costs to that date. RG&E chose to include an April 1, 2015 effective date with retroactive payments (plus interest) in its initial RSSA, but the Commission is under no obligation to accept these terms.

Furthermore, even if the Commission does ultimately approve an RSSA that would impose retroactive costs, it could easily structure their collection from ratepayers to avoid rate compression. Such a structure would defer collection of those RSSA-related costs that arise between the RSSA's effective date and the date of final agency approval (that is, the period during which a deferred collection amount would accumulate) until after the termination of the RSSA. RG&E would then be authorized to

⁹ Exhibit 3, *Reliability Support Services Agreement Between R.E. Ginna Nuclear Power Plant, LLC and Rochester Gas and Electric Corporation* (filed February 13, 2015) at § 2.1(c).

¹⁰ Case 14-E-0270, *Petition Requesting Initiation of a Proceeding to Examine a Proposal for Continued Operation of the R.E. Ginna Nuclear Power Plant, LLC.*, Ruling on Scope of Issues for Hearing (Issued May 14, 2015) at 5-6; Docket No. ER15-1047-000, *R.E. Ginna Nuclear Power Plant, LLC*, 151 FERC ¶ 61,023, Order Rejecting in Part, and Accepting in Part and Suspending Proposed Rate Schedule, Subject to Refund, and Establishing Hearing and Settlement Procedures (issued April 14, 2015) at ¶ 42.

continue collecting from ratepayers until it was made whole. This structure would properly shift the cash flow penalty associated with deferred collection from customers (who, as discussed above, are neither responsible for nor are in a position to bear such a penalty) to RG&E, which bears actual responsibility for any potential rate compression.

IV. RG&E SHOULD REPAY THE MONEY IT OWES RATEPAYERS FIRST.

Finally, even assuming, *arguendo*, that the RSSA will go into effect in its present form, and even if there were no means of avoiding rate compression, the surcharge would be inappropriate because RG&E already owes its customers money sufficient to cover any potential rate compression. RG&E currently holds over \$155 million of ratepayer money in the form of three pools of deferred regulatory liabilities, or “customer credits.”¹¹ These credits far exceed the deferred collection amounts (approximately \$25 million through July 2015¹²), and the principle of intergenerational equity dictates that they be returned to customers as quickly as reasonably practicable. RG&E’s customers are penalized for each day that RG&E holds their money without delivering them corresponding value. Yet RG&E proposes to swell its store of customer credits, and exacerbate this cost/value imbalance, by collecting even more ratepayer money to cover speculative RSSA costs that are not yet owed to anyone.

RG&E does not, and cannot, muster a serious argument against using customer credits to offset potential rate compression. Each of the four explanations RG&E advances,¹³ discussed individually below, fail to justify its refusal to repay customer credits.

1. RG&E’s cash position

RG&E argues that the absence of a surcharge would weaken its cash position “at the same time RG&E is making net payments to Ginna and will be expending cash to

¹¹ Exhibit 6, RG&E Responses to Multiple Intervenors Information Requests Nos. 39-41.

¹² See Case 14-E-0270, *Petition of Rochester Gas and Electric Corporation for a Temporary Rate Surcharge* (filed June 4, 2015) at 4.

¹³ Exhibit 10, RG&E Responses to DPS Staff Information Request No. 1.

build its Ginna Retirement Transmission Alternative Project [GRTA].”¹⁴ Every expenditure of cash weakens RG&E’s cash position, but only extraordinary situations warrant imposition of a temporary surcharge and emergency treatment under SAPA. While RG&E will have to expend funds to build the GRTA,¹⁵ it has already laid the necessary groundwork to recover those funds in its recently-filed rate case.¹⁶ Notably, RG&E does not deem the recovery of those costs – approximately \$150 million – to be urgent enough to warrant temporary rates.¹⁷

Additionally, RG&E should not be allowed to punish its ratepayers for its own poor financial decisions. RG&E has over-collected more than \$155 million from its customers in recent years. Furthermore, RG&E has dramatically increased the dividend it paid to its sole shareholder, Iberdrola USA, without any corresponding increase in sales revenues. RG&E’s 2013 financial reports indicate that it paid Iberdrola a dividend of \$75 million;¹⁸ in 2014, despite nearly flat sales and cash flow, and net cash of \$35 million less than in the prior year, RG&E awarded Iberdrola \$100 million.¹⁹ If RG&E’s cash position truly necessitates an emergency surcharge to cover RSSA costs, then its own financial mismanagement is to blame. The Commission should not encourage such behavior by awarding RG&E a customer-funded loan.²⁰

2. RG&E’s balance sheet and credit quality

RG&E contends that refund of customer credits may stress RG&E’s credit quality “at a time when credit quality will be a crucial element to the success of industry

¹⁴ *Id.*

¹⁵ Case 14-E-0270, Testimony of RG&E Panel at Evidentiary Hearing (July 2, 2015) at 49-50.

¹⁶ *Id.* at 50.

¹⁷ *Id.* (“The Company is not filing for temporary rates to cover the cost of the GRTA.”)

¹⁸ Matter Master: 10-01664, Filing No. 25, pages 120-21.

¹⁹ Matter Master: 10-01664, Filing No. 21, pages 120-21.

²⁰ Indeed, the need for an RSSA itself stems in part from RG&E’s failure to timely implement alternatives that could compensate for the retirement of Ginna. See Case 11-T-0534, *Application of Rochester Gas and Electric Corporation for a Certificate of Environmental Compatibility and Public Need for the Construction of “Rochester Area Reliability Project,” Approximately 23.6 Miles of 115 Kilovolt Transmission Lines and 1.9 Miles of 345 Kilovolt Line in the City of Rochester and the Towns of Chili, Gates and Henrietta in Monroe County*, Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued April 23, 2013), at 9 (“In addition, RG&E intends to ensure that its system will allow for the contingency of the possible retirement of Ginna in the future.”).

restructuring through the REV [Reforming the Energy Vision] proceeding.”²¹ RG&E does not, however, provide any evidence that the use of customer credits might pose an actual risk of affecting its credit quality. Furthermore, the consequence of which RG&E warns – that a potentially impaired credit quality might impede REV-related industry restructuring – is specious. REV is currently in a preliminary planning phase; at hearing, RG&E was unable to identify any instances in which it expects to borrow money to make REV-related expenditures.²² And, as noted above, were the concern about the impact of REV on RG&E’s credit quality real, RG&E should not have increased the dividend it paid its parent by \$25 million last year. The links between customer credits, RG&E’s credit quality, and REV are tenuous at best. In contrast, the impacts to ratepayers of the requested surcharge are all too real.

3. Symmetrical treatment of liabilities and assets

RG&E argues that because an affiliated company, New York State Electric and Gas (“NYSEG”), has incurred \$260 million of storm-related costs that it will recover from ratepayers over five years, RG&E should also be given five years to repay the customer credits it presently holds. In making this argument, RG&E inappropriately compares itself to a completely separate company, as well as failing to distinguish between a storm cost-related regulatory asset and RGE’s customer credits, none of which are related to storm costs. Furthermore, even were the cases comparable, the reasoning behind the five-year collection period in NYSEG’s case – namely, that an extended period was chosen in order to mitigate customer impacts²³ – weighs against imposing a major, immediate new cost on customers here.

4. Rate design options

RG&E states that “[r]ate design options should be pursued to address particular issues associated with RSSA billing.”²⁴ This statement does not bear on the amount or

²¹ Exhibit 10, RG&E Responses to DPS Staff Information Request No. 1.

²² Case 14-E-0270, Testimony of RG&E Panel at Evidentiary Hearing (July 2, 2015) at 53.

²³ See *id.* at 56.

²⁴ Exhibit 10, RG&E Responses to DPS Staff Information Request No. 1.

availability of customer credits. For purposes of determining whether to use customer credits instead of a surcharge, the Commission should disregard this statement entirely.

CONCLUSION

For these reasons, RG&E has failed to demonstrate that its requested surcharge is necessary. The harm of a major rate increase on ratepayers far outweighs the unsubstantiated, readily-avoided prospect of potential rate compression. Furthermore, RG&E already possesses customer funds that are more than adequate to cover any costs of deferred collection should they arise. UIU therefore respectfully urges the Commission to deny RG&E's petition in its entirety.

Respectfully submitted,

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