

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission
Investigating the March 2017 Windstorm,
Related Power Outages, and Rochester
Gas and Electric and New York State
Electric & Gas Restoration Efforts. Case 17-E-0594

Proceeding on Motion of the Commission
as to the Rates, Charges, Rules and
Regulations of New York State Electric
& Gas Corporation for Electric Service Case 15-E-0283

Proceeding on Motion of the Commission
as to the Rates, Charges, Rules and
Regulations of Rochester Gas and
Electric Corporation for Electric Service Case 15-E-0285

**STAFF STATEMENT IN SUPPORT
OF JOINT PROPOSALS**

July 13, 2018

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

- Case 17-E-0594 - Proceeding on Motion of the Commission Investigating the March 2017 Windstorm, Related Power Outages, and Rochester Gas and Electric and New York State Electric & Gas Restoration Efforts.
- 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.
- Case 15-E-0285 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric Service.

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I. INTRODUCTION

In accordance with the June 13, 2018 ruling by Administrative Law Judge Dakin Lecakes, Department of Public Service (Department) Staff (Staff) submits this Statement in Support of Joint Proposals filed on May 18, 2018. This statement supports two joint proposals: The first Joint Proposal was executed and filed by the Department and Rochester Gas and Electric Company (RG&E) and New York State Electric & Gas Corporation (NYSEG)(together both will be referred to as the "Companies") (Joint Proposal), and provides for Three Million Nine Hundred Thousand Dollars, (\$3,900,000) (Settlement Amount) to settle 12 alleged potential violations of the Companies' Emergency Response Plan, as set forth in the Commission's Order Instituting Proceeding and to Show Cause initiating Case 17-E-0594 and ordering NYSEG and RG&E to show cause why the Commission should not pursue an administrative penalty, pursuant

to Public Service Law (PSL) § 25-a.¹ By the Order to Show Cause, NYSEG and RG&E were directed to show cause why the Commission should not pursue an administrative penalty, pursuant to Public Service Law (PSL) § 25-a.

The second related Joint Proposal (Investments Joint Proposal) (both joint proposals will be referred to as the "Joint Proposals"), also filed on May 18, 2018, was executed by the Department; the Companies; Department of State, Consumer Protection Division, Utility Intervention Unit (UIU); the City of Rochester (Rochester); and, the International Brotherhood of Electrical Workers IBEW Local 10 (Union). The Investments Joint Proposal sets forth how the Settlement Amount will be allocated for certain projects and used to increase resiliency and improve emergency response in the areas impacted by the March 2017 Windstorm. These projects include initiatives for customers on life support equipment (LSE customers), critical facilities, as well as providing for resiliency measures for higher risk outage areas in the Companies' service territory that was impacted by the March 2017 Windstorm.²

Staff believes the Joint Proposals are reasonable, and provide substantial funding at no expense to ratepayers for additional resiliency and emergency response measures that would

¹ Case 17-E-0594, Proceeding on Motion of the Commission to Investigate the March 2017 Windstorm, Related Power Outages, and Rochester Gas and Electric and New York State Electric & Gas Restoration Efforts (issued November 16, 2017) (Order to Show Cause).

² The projects and initiatives include: Life Support Equipment - Assistance Program; Life Support Equipment - Two Way Text Messaging; Composite Pole - Storm Hardening/Resiliency, Distribution Hardening/Resiliency; Installation of Monitoring at Critical Facilities; Mobile Command Center; and Backup Generation for Rochester Warming Center. See Appendix A of the Investment Joint Proposal for funding and project detail.

most likely not be implemented but for these Joint Proposals. Therefore, the Joint Proposals are in the public interest. Staff recommends that the Commission adopt the Joint Proposals in their entirety.

II. BACKGROUND

On the afternoon of March 8, 2017, the March 2017 Windstorm swept across Western New York State, causing widespread damage and many thousands of electric service interruptions. The March 2017 Windstorm caused major damage to overhead electric distribution systems. Residential homes and businesses throughout the area were severely affected. More than 250,000 RG&E and NYSEG customers experienced power outages during the storm with Central (RG&E), Sodus (RG&E), Lancaster (NYSEG) and Lockport (NYSEG) being the hardest hit areas. Service was restored on March 11 to all customers in the Lockport (NYSEG) and Sodus (RG&E) areas, on March 13 in Lancaster (NYSEG), and on March 15 in the Central area (RG&E).

On March 11, 2017, the Department began an investigation of the Companies' preparation and response to the March 2017 Windstorm.³ Department Staff (Staff) conducted personal interviews of all appropriate employees and officers of the Companies, as well as conducting both formal discovery, reviewing the Companies' storm related reports, and reviewing

³ Public Service Law § 66(2) authorizes the Commission to investigate utilities. Public Service Law §66(21) requires each electric utility to file its Emergency Response Plan on or before December 15 of each year for Commission review and approval. Both PSL §66(21) and 16 NYCRR Part 105 specify the content and information to be in the Emergency Response Plan.

all comments received at the Public Statement Hearings and through the public comment process.⁴

The Department investigation considered whether the Companies were properly prepared for, and how they responded to, the effects of the March 2017 Windstorm. Staff also examined the communications used to inform customers, emergency management personnel, governmental officials, and the media of the Companies' response and restoration efforts. Staff reviewed the self-assessment report and performed its own assessment of NYSEG and RGE's storm recovery efforts. To perform its analysis, Staff reviewed a combination of factors, including a review of compliance with the Companies' emergency response plan; discussions and interviews with utility representatives and public officials; evaluation of complaint data filed with the Department's Office of Consumer Services; comments received as part of public statement hearings; meetings with Company management and staff; analysis of the Companies' responses to information requests; and other salient information.⁵

On November 16, 2017, the Department issued a report entitled: *March 2017 Windstorm A Report on NYSEG and RG&E*

⁴ Commission regulations require any New York investor-owned utility that experience an outage with a restoration period exceeding three days to file self-assessments of their restoration efforts. NYSEG and RGE submitted a combined report related to this event because they respond as one entity under their emergency response plan.

⁵ 16 NYCRR Part 105 Section 105.6 (b) allows utilities, under emergency conditions, to modify their response from that in filed emergency response plans to the extent required to restore service in a safe and efficient manner. However, any modifications are required to be filed with the Secretary within 60 days from restoration of full service.

*Electric Restoration and Communication Efforts.*⁶ While Staff found certain areas where the Companies performed appropriately, Staff's analyses found several areas where the Companies did not follow their Emergency Response Plan or where improvement was required. Staff identified twelve alleged violations of the Companies' Emergency Response Plan, and these alleged violations formed the basis, in part, of the Order to Show Cause.

The Companies requested several extensions of time to respond to that portion of the Order to Show Cause regarding an administrative penalty pursuant to PSL §25-a because the Companies and Staff desired to engage in settlement discussions. The Secretary granted all such requested extensions.

Additionally, in accordance with 16 NYCRR §3.9, on February 12, 2018, a Notice of Impending Settlement Negotiations was sent to all parties to both the above-captioned case and each Company's current rate case, Cases 15-E-0283, 15-G-0284, 15-E-0285 and 15-G-0286, and such parties were invited to the settlement conference that produced the Investments Joint Proposal. Staff, the Companies, Rochester, UIU and the Union participated in settlement negotiations. Upon understanding that the Joint Proposals would not mandate funding by ratepayers, Multiple Intervenors elected to not actively participate.

On June 13, 2018, pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register [SAPA No. 17-E-0594SP1],

⁶ Matter 17-00540, In the Matter of an Investigation into the March 2017 Windstorm, Related Power Outages, and Rochester Gas and Electric and New York State Electric & Gas Restoration Efforts, March 2017 Windstorm: A Report on NYSEG and RGE Electric Restoration and Communication Efforts (November 2017) (DPS Report).

requesting submission of comments on the Investments Joint Proposal on or before August 12, 2018. Additionally, on June 6, 2018, a Notice Seeking Comments on the Joint Proposals was issued by the Commission's Secretary requesting comments on or before August 13, 2018. It should be noted that there is no known opposition to the Joint Proposals.

III. OVERVIEW OF THE JOINT PROPOSALS

Staff's principal objectives in negotiating a settlement were to ensure that any agreed upon settlement amount was substantial and would be used to increase system resiliency and emergency preparedness, as well as provide funding for initiatives to address concerns raised in the DPS Report and public comments.

The Companies and Department have agreed to settle matters associated with the 12 alleged violations at a cost to the Companies of \$3.9 million. The Settlement Amount will be allocated at \$2.8 million to RG&E electric and \$1.1 million to NYSEG electric. This allocation was agreed upon based on the number of outages each experienced. The Companies will use the Settlement Amount to make investments designed to increase resiliency and improve emergency response in the areas impacted by the March 2017 Windstorm. The investments will not be reflected in the Companies' rate base or operating expenses in establishing future delivery rates, but instead will be recorded in below-the-line accounts to protect ratepayers.

The parties realize that the final amount spent may not be exactly equal to the Settlement Amount; however, the Companies will use prudent business practices to strive to keep the costs reasonable and below the Settlement Amount. If the the total amount spent is less than the Settlement Amount, then an appropriate regulatory liability in the amount of the

underspend will be established for the benefit of customers, with carrying charges applied at the pre-tax rate of return on the after-tax balance of the amounts deferred. However, if the Company determines that the cumulative cost of the projects is expected to exceed the Settlement Amount by 10% or more, the Companies will file a notice with the Secretary within 10 days of such determination. The Companies will include any cumulative amount spent in excess of the Settlement amount in rate base, subject to Department Staff review, and will be incorporated in their next rate case filings. The intent of this provision is to ensure that customers obtain the full benefit of the Settlement Amount and the Companies are not required to absorb an amount above the Settlement Amount, while protecting ratepayers once the Companies determine any additional funding is necessary.

Finally, as a further check on costs, the Companies will file a status report with the Commission on or before May 18, 2019 indicating the amount spent on each of the Appendix A projects and the completion date of each project. The costs of the projects described in Appendix A of the Investments Joint Proposal (up to the dollar value of the Settlement Amount) will be reflected on the Companies' books and records as below-the-line investments to assure they would be segregated from rate base investments.

IV. STANDARD FOR REVIEW

The Commission's Settlement Guidelines state that all decisions, including those to adopt the terms of settlement agreements (Joint Proposals) must be just and reasonable and in

the public interest.⁷ In addition to compliance with proper procedures, determining whether the terms of the Joint Proposal are in the public interest involves substantive consideration of the following:

1. Consistency with the law and regulatory, economic, social and environmental State and Commission policies;
2. Whether the terms of the Joint Proposal compare favorably with the likely result of a fully litigated case and produces a result within the range of reasonable outcomes;
3. Whether the Joint Proposal fairly balances the interests of ratepayers, investors and the long-term soundness of the utility; and,
4. Whether the Joint Proposal provides a rational basis for the Commission's decision.

The Joint Proposals resolve all outstanding issues to that portion of the Order to Show Cause that relates to the alleged violations of the Companies' Emergency Response Plan, and any potentially further Commission action under PSL §25-a, as well as issues raised during settlement negotiations. The Joint Proposals fully comport with the Commission's Settlement Guidelines. The fact that there is no opposition to these Joint Proposals supports they are reasonable and in the public interest. Parties representing a diverse customer base, including residential and municipal customers, and all their interests, fully support these Joint Proposals. Additionally, none of the parties would dispute that the agreement was reached

⁷ 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), p. 30.

among normally adversarial parties. The terms of the Joint Proposals support the conclusion that a result was produced within the range that could be expected in litigation.

As to the agreed upon Settlement Amount, Public Service Law § 25-a (3) and (5) authorize the Commission to commence an administrative penalty proceeding against combination gas and electric corporations to determine, by a preponderance of the evidence, whether the corporation violated the Public Service Law or an order or regulation adopted pursuant to the Public Service Law. Such violations, pursuant to PSL §25-a(5) may warrant a Commission-assessed penalty against,

...a combination gas and electric corporation determined by the commission to have failed to reasonably comply by a preponderance of the evidence with a provision of this chapter, or an order or regulation adopted under authority of this chapter, designed to protect the overall reliability and continuity of electric service, including but not limited to the restoration of electric service following a major outage event or emergency, shall forfeit a sum not to exceed the greater of:

(a) five hundred thousand dollars or four one-hundredths of one percent of the annual intrastate gross operating revenue of the corporation, not including taxes paid to and revenues collected on behalf of government entities, whichever is greater, constituting a civil penalty for each separate and distinct offense; provided, however, that for purposes of this paragraph each day of a continuing violation shall not be deemed a separate and distinct offense. The total period of a continuing violation, as well as every distinct violation shall be similarly treated as a separate and distinct offense for purposes of this paragraph; or

(b) the maximum forfeiture determined in accordance with subdivision three of this section.

Under PSL §25-a, each alleged violation of the Companies' Emergency Response Plan was arguably a violation of

the corresponding Commission's Order adopting such Emergency Response Plan,⁸ and the Commission's regulations Part 105.

Therefore, if each and every alleged violation was fully litigated and the Commission determined that the maximum penalty was warranted for each violation the maximum penalty would have been approximately \$6.0 million. It should be noted that any such Commission determination would have been subject to judicial appellate review. Given the facts and circumstances of each alleged violation, as well as the 2017 March Windstorm itself, there was litigation risk in achieving the maximum amount, and therefore, the approximately \$4.0 million settlement was reasonable to Staff and the Department. Additionally, given the reality of the appellate process, by reaching agreement, ratepayers would timely be receiving the benefit of the Settlement Amount and agreed upon initiatives and projects.

The Joint Proposals should be adopted because they satisfy the criteria the Commission has established for judging the reasonableness of settlements. The Joint Proposals satisfy the Commission's charge to determine whether such proposal satisfies the PSL requirement that safe and adequate service be provided at just and reasonable rates. Further, the Joint Proposals achieve a fair balance of interests among the parties, and produces constructive results that may not have been achievable except through a negotiated agreement.

⁸ Case 16-E-0635, In the Matter of the December 15, 2016 Electric Emergency Plan Review, Order Approving Amended Emergency Plans (issued March 13, 2017) (Emergency Response Plan Order). Also, Commission Part 105 requires compliance with the effective Emergency Response Plan. 16 NYCRR §105.5.3 requires annual Emergency Response Plan filings and PSL §66(21) requires these filings on or before December 15 for the following calendar year. Additionally, NYSEG and RGE file a combined Emergency Response Plan to be followed by both companies.

Support Among the Parties

There is unanimous party support for the Joint Proposals warranting approval. The support of Rochester, UIU, and the Union is noteworthy showing support from a diverse customer base.

Adequacy of the Record

The record is adequate to justify adoption of all the Joint Proposals' terms. The Joint Proposals provide funding to the detriment of only the Companies' shareholders - ratepayers will only benefit and are protected from any project cost overruns. Appendix A to the Investments Joint Proposal presents a detailed description of each project, along with estimated costs and milestones. It should be noted that it is anticipated by all parties that the Settlement Amount will pay for these projects. In the event the costs are less, ratepayers keep that benefit, and if the costs are estimated to be greater, Staff has the ability to review such estimates.

Public Interest

The remaining criteria for judging whether a Joint Proposal is reasonable are directed towards ascertaining whether the proposed terms are in the public interest. Staff notes that the Joint Proposals are intended to be considered as a whole, with each individual section providing support and balance to the others. Further, Staff is aware that the Commission may accept, reject, or modify, in whole or in part, any recommendation or term of the Joint Proposals. It is Staff's belief that the Joint Proposals fairly resolve the concerns raised in the PSL §25-a portion of the Order to Show Cause, provide for greater system reliability and safety concerns, and

thereby provide "better" service at shareholder cost. The Joint Proposals satisfy the public interest standard, and thus, should be approved without modification.

Again, there is no opposition to these Joint Proposals. There is an adequate record to support the terms of the Joint Proposals, which are consistent with both law and policy, have a rational basis, balance the interests of all ratepayers, and compare favorably with the outcome of litigation. The Joint Proposals satisfy all these criteria, and therefore, are in the public interest and should be adopted.

V. CONCLUSION

For all the foregoing reasons, the Joint Proposals should be adopted because they face no opposition, provide funding to allow for greater electric system resiliency and the Companies' emergency preparedness, achieve a fair balance of interests among the parties and customers, produce constructive results that may not have been achievable except through settlement, and otherwise conform to Commission policies.

Respectfully submitted,

S/

John L. Favreau
Staff Counsel

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Albany, New York