

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 18-E-0067 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Electric Service.

CASE 18-G-0068 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Gas Service.

RULING DENYING O&R's MOTION TO STRIKE TESTIMONY

(Issued September 10, 2018)

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

INTRODUCTION

On January 26, 2018, Orange and Rockland Utilities, Inc. (O&R or the Company) initiated these proceedings by filing tariff amendments proposing increases in electric and gas delivery rates and charges. In compliance with our March 22, 2018 scheduling order, trial staff for the Department of Public Service (DPS Staff) and several other parties filed testimony on May 25, 2018. Pro se intervenor Deborah Kopald filed testimony (the Kopald testimony) on May 26, 2018 pursuant to a one-day extension we granted to the May 25 filing deadline. On June 15, 2018, O&R filed rebuttal testimony and a motion to strike the Kopald testimony in its entirety from the record.

In this ruling, we deny O&R's motion to strike the Kopald testimony although we find it to present issues that, for the most part, have already been decided by the Commission and are outside the scope of these rate proceedings. We decline to consider those issues in any evidentiary hearings over which we will be presiding in these matters.

BACKGROUND

Advanced Metering Infrastructure

Advanced Metering Infrastructure (AMI) is a communications network and electric and gas "smart" metering system that provides time-stamped measurements of energy usage and other data for both customers and utilities.¹ With AMI data, customers can time and control energy usage, thereby reducing their energy bill. Utilities can use AMI data to improve electric grid operations; monitor distribution systems and equipment performance in real time; integrate distributed energy resources (e.g., solar and energy storage) into the distribution system; enhance demand response programs; manage load and improve efficiency; and promptly detect outages to efficiently restore electric power.² AMI has environmental benefits because it reduces greenhouse gases by facilitating a customer's ability to adjust and reduce energy consumption. AMI also has operational benefits by providing utilities with the tools to make the distribution system more efficient and eliminate resource-intensive utility meter readings.

AMI components communicate using wireless technology. The Kopald testimony at issue here criticizes AMI, alleging that its use increases ambient electromagnetic radiation emissions, which in turn pose health risks to individuals with electromagnetic hypersensitivity.

¹ The AMI system has three major components: a communications network, electric meters or gas modules, and a system that controls communications and operations of meters and other field devices.

² Case 13-E-0030, Consolidated Edison Company of New York, Inc. - Electric Rates, Order Approving Advanced Metering Infrastructure Business Plan Subject to Conditions (issued March 17, 2016) (Con Edison AMI Order), pp. 19-20.

Reforming the Energy Vision

In the Reforming the Energy Vision (REV) proceeding, the Commission adopted policy objectives intended to modernize New York's energy grid and incentivize clean energy innovation by fostering new investments in energy saving technologies designed to reduce energy usage and greenhouse gas emissions.³ Among REV's objectives is greater customer involvement to advance energy efficiencies and to control energy usage through the use of advanced technologies such as AMI.⁴ In the REV proceeding, the Commission sought to align rate design with new clean energy and other regulatory policy objectives by incentivizing investments in AMI and other new technologies.⁵ The Commission established a framework for AMI deployment and its required functionality, and directed utilities to develop implementation plans, consult with vendors, and file AMI proposals.⁶

AMI Deployment in New York

In June 2015, the Commission issued an order adopting the terms of a Joint Proposal extending the rate plan of O&R's

³ Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Order Adopting Regulatory Policy Framework and Implementation Plan (issued February 26, 2015) (Track One Regulatory Framework Order).

⁴ Case 16-M-0411, In the Matter of Distributed System Implementation Plans, Order on Distributed System Implementation Plan Filings (issued March 9, 2017) (DSIP Order), p. 9; Order Adopting Distributed System Implementation Plan Guidance, (issued April 20, 2016) (DSIP Guidance Order).

⁵ Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Order Adopting a Ratemaking and Utility Revenue Model Policy Framework (issued May 19, 2016) (Track Two Ratemaking Order).

⁶ Id., p. 143.

affiliate, Consolidated Edison Company of New York, Inc. (Con Edison) and, for the first time in New York, authorizing the deployment of AMI "backbone" components in parts of Con Edison's service territory.⁷ Pursuant to that order, Con Edison submitted an AMI Business Plan and Benefit Cost Analysis (BCA), which the Commission conditionally approved, finding that AMI would modernize the company's electric and gas distribution system, assist in managing electrical outages, and empower customers to participate in demand response and manage their bills.⁸ The Commission concluded that AMI not only benefitted Con Edison and its customers, but also provided "substantial environmental benefits by reducing emissions."⁹ Con Edison's AMI program is currently being implemented in its service territory at an approved capital cost of \$1.285 billion over seven years.¹⁰

2015 O&R Rate Order

In November 14, 2014, O&R filed tariff amendments to increase electric and gas delivery rates in its Rockland, Orange and Sullivan County service area (2014 Rate Proceeding).¹¹ In the 2014 Rate Proceeding, O&R proposed to install 116,000

⁷ Case 13-E-0030, Consolidated Edison Company of New York, Inc. -- Electric Rates, Order Adopting Terms of Joint Proposal to Extend Electric Rate Plan (issued June 19, 2015).

⁸ Case 13-E-0030, supra, Order Approving Advanced Metering Infrastructure Subject to Conditions (issued March 17, 2016), p. 2. The order's conditions included submission of a customer engagement plan, updated benefit cost analysis, success metrics, and tariff amendments containing solutions for customers wishing to opt out of AMI.

⁹ Id.

¹⁰ Id., pp. 4-5.

¹¹ Cases 14-E-0493 and 14-G-0494, Orange and Rockland Utilities - Gas and Electric - Rates (2014 Rate Proceeding).

electric and 91,000 gas AMI meters and associated communications infrastructure over five years in part of its Rockland County service area.¹² Settlement negotiations among the parties in the 2014 Rate Proceeding resulted in the execution of a Joint Proposal, the terms of which the Commission adopted and incorporated into its October 16, 2015 Order (2015 Rate Order).¹³ Before agreeing to the terms of the Joint Proposal, DPS Staff reviewed numerous issues associated with AMI related to costs and benefits, functionality, privacy, security, opt-out charges, and human health and safety, such as customer concerns about electromagnetic fields and radiation emissions.¹⁴

The 2015 Rate Order established a rate plan for the period commencing on November 1, 2015, and ending on October 31, 2017 for electric and October 31, 2018 for gas and authorized AMI deployment.¹⁵ The 2015 Rate Order's purpose in authorizing AMI was to reduce operating costs, assist in more timely identification of customer outages, and improve overall outage response and efficiency.¹⁶ It recited O&R's position that AMI was a mechanism to achieve REV's objectives and to provide significant customer benefits by allowing them to manage their energy usage and participate in energy efficiency and demand

¹² 2014 Rate Proceeding, DPS Staff AMI Panel Testimony (March 31, 2015), p. 6.

¹³ 2014 Rate Proceeding, Order Adopting Terms of Joint Proposal and Establishing Rate Plan (issued October 16, 2015) (2015 Rate Order).

¹⁴ 2014 Rate Proceeding, DPS Staff AMI Panel Testimony, pp. 7-14, 18-21; 27-39. Prior to the Commission's adoption of the terms of the Joint Proposal in the 2015 Rate Order, public statement hearings were held on June 30, 2015 in Goshen, New York and on July 1, 2015 in Ramapo, New York.

¹⁵ 2015 Rate Order, Attachment A: Joint Proposal, pp. 1-2.

¹⁶ 2015 Rate Order, Attachment A: Joint Proposal, p. 19.

response programs.¹⁷ It also recited the position of Pace Energy and Climate Center that AMI would help to animate distributed energy resource markets in a manner consistent with the Commission's previously-articulated REV goals.¹⁸

The 2015 Rate Order authorized, among other things, "Phase One" AMI deployment in parts of Rockland County and approved a total capital expenditure of \$28.1 million over three years, with a total expenditure cap of \$43.3 million over five years.¹⁹

The 2015 Rate Order required O&R to collaborate with DPS Staff and numerous stakeholders in the preparation of an AMI business plan detailing system implementation and presenting all associated costs.²⁰ The Order approved monthly fees to be assessed for customers opting out of the AMI "smart meter"

¹⁷ 2015 Rate Order, p. 14.

¹⁸ 2015 Rate Order, p. 16. See Case 14-M-0101, supra, Proceeding in Regard to Reforming the Energy Vision.

¹⁹ 2015 Rate Order, Attachment A: Joint Proposal, p. 15-16. There appears to be a \$1.4 million discrepancy between the 2015 Rate Order and the Joint Proposal in the approved capital expenditures for AMI deployment in Rockland County in each of three rate years. The 2015 Rate Order (pp. 14-15) recites approved costs of \$10.8, \$8.2 and \$9.1 million for Rate Years (RYs) 1, 2 and 3 respectively, or a total capital expenditure of \$28.1 million. See 2015 Rate Order, pp. 14-15. The Joint Proposal (p. 19), on the other hand, recites costs of \$11.7, \$8.2 and \$9.1 million for RYs 1, 2 and 3 respectively, or a total capital expenditure of a \$29.5 million. The 2015 Rate Order governs the amount approved by the Commission for AMI costs and expenditures.

²⁰ 2015 Rate Order, Joint Proposal, pp. 58-61. The Joint Proposal set forth a series of steps O&R was required to take with Staff and the public, including meetings and opportunity to submit comments on the business plan.

installation.²¹ The opt-out fees were applicable to any customer who refused to allow AMI or AMR meter installation or who requested a smart meter to be disabled or removed.²²

The 2015 Rate Order required O&R to reconcile AMI costs separately from other capital expenditures and to implement a "savings tracker" to document actual energy savings compared to projected savings.²³ It also specifically stated that the Commission would make further determinations regarding AMI's deployment, including modifying or halting its implementation.²⁴

Ms. Kopald did not participate in the 2014 Rate Proceeding.

O&R's AMI Business Plan

In accordance with the 2015 Rate Order, O&R filed an AMI Business Plan containing the details of the program's implementation.²⁵ The AMI Business Plan recited the measures to be used for system privacy and security of AMI data and functions, including "end-to-end data encryption, rigorous access controls and the monitoring of security related events

²¹ 2015 Rate Order, Joint Proposal, pp. 50-51. The 2015 Order approved opt out fees at \$15 per month for customers with both electric and gas service, or \$10 per month for customers with only one of those services. An additional one-time fee of \$90 was approved for customers requesting AMI or AMR meter removal who have both electric and gas service; \$45 for customers with only electric; and \$55 for customers with only gas.

²² 2015 Rate Order, Joint Proposal, pp. 50-51.

²³ 2015 Rate Order, Joint Proposal, p. 21.

²⁴ 2015 Rate Order, pp. 16-17.

²⁵ 2014 Rate Proceeding, O&R Business Plan (November 19, 2015) (AMI Business Plan).

and alerts.”²⁶ The Business Plan also called for privacy, security and cybersecurity measures to be implemented, including data encryption, detection, prevention, firewalls, and authentication technologies and privacy policies and procedures.²⁷ On July 29, 2016, O&R filed a Benefit Cost Analysis Summary and Matrix for the AMI program, showing project costs of \$91.1 million and reflecting a net benefit of approximately \$15.6 million (net present value) over 20 years using the Societal Cost Test.²⁸

AMI Customer Engagement Plan

On July 29, 2016, O&R and Con Edison jointly filed their AMI Customer Engagement Plan.²⁹ The Plan contained the conclusions of the Companies’ AMI data privacy assessment and addressed customer privacy concerns.³⁰ It called for the AMI program to include “Green Button Connect” (GBC) capability, a secure, customer-driven nationwide standard protocol capable of receiving and sharing energy usage, cost and other data.³¹ GBC

²⁶ AMI Business Plan, p. 22.

²⁷ AMI Business Plan, pp. 26-28.

²⁸ 2014 Rate Proceeding, O&R BCA Summary and BCA Matrix (July 29, 2016). Also pursuant to the 2015 Rate Order, O&R filed a Customer Outreach and Education Plan in Cases 14-E-0493 and 14-G-0494 on September 29, 2017, detailing how the Company intended to inform and engage its customers about AMI.

²⁹ Case 13-E-0030, supra, Con Edison and O&R AMI Customer Engagement Plan (July 29, 2018).

³⁰ Case 13-E-0030, supra, Con Edison and O&R AMI Customer Engagement Plan (July 29, 2018), pp. 100-112. The CE Plan’s data privacy assessment used the National Institute of Standards and Technology’s (“NIST”) Privacy and the data access principles derived from Fair Information Practice Principles (“FIPP”).

³¹ Case 13-E-0030, supra, Con Edison and O&R AMI Customer Engagement Plan (July 29, 2018), p. 36

enables customers to download their own energy usage data and, if they choose, share it with third parties for analysis, but also enables shared customer data to exclude personally identifiable information, thereby maintaining customer privacy.³²

O&R 2017 AMI Expansion Petition

On February 13, 2017, O&R filed a petition seeking, among other things, authorization to expand the AMI program into its entire service territory (AMI Expansion Petition).³³ This included AMI deployment in Orange and Sullivan Counties and the parts of Rockland County not addressed in the 2015 Rate Order. The Petition requested authorization to enhance the scope and functionality of AMI "due to the Company's alignment with affiliate Con Edison's implementation of an AMI system" in Con Edison's territory.³⁴

O&R's AMI Expansion Petition proposed technological enhancements to the AMI program and increased funding levels. O&R reported that, due to a number of factors, costs associated with implementing enhanced AMI would be \$61 million, rather than the \$43.1 million funding level cap approved in the 2015 Rate Order.³⁵ O&R claimed that AMI deployment in Orange and Sullivan Counties would cost an additional \$37 million, bringing the total estimated AMI cost for deployment in its entire service area to \$98.5 million.³⁶ O&R's Petition also contained proposed

³² Id.

³³ Case 17-M-0178 - Petition of Orange and Rockland Utilities, Inc. for Authorization of a Program Advancement Proposal, (filed February 13, 2017) (AMI Expansion Petition).

³⁴ AMI Expansion Petition, pp. 18-20; Attachment 1.

³⁵ AMI Expansion Petition.

³⁶ AMI Expansion Petition, Attachment 1.

expenditures and revenue requirements for the period 2017 to 2020.³⁷ Relying on O&R's BCA, the AMI Expansion Petition again asserted that the program would have a net present value benefit of \$15.6 million (based upon the Societal Cost Test).³⁸

With respect to recovering AMI costs in rates, O&R's Petition proposed "to defer the carrying charges on any AMI system related capital investments, above those levels which are included in the Company's current electric and gas rate plans, until such time as the Commission resets the Company's electric and gas base rates."³⁹

Ms. Kopald was a party to the AMI Expansion Proceeding, but filed no response to O&R's Petition prior to the Commission's issuance of the order approving the enhanced and expanded AMI program.

Commission's AMI Expansion Order

On November 16, 2017, the Commission issued an order granting O&R's AMI Expansion Petition in part and authorizing technical enhancements to the AMI program and its expanded deployment in O&R's entire service territory in partnership with affiliate Con Edison. (AMI Expansion Order).⁴⁰ The Commission found that AMI implementation "will enable improved customer service and engagement, increased operational efficiency and performance, provide a foundation for future technological

³⁷ AMI Expansion Petition, Attachment 1.

³⁸ AMI Expansion Petition, pp. 17-20.

³⁹ AMI Expansion Petition, p. 20.

⁴⁰ Case 17-M-0178, supra, Order Granting Petition in Part (issued November 16, 2017) (AMI Expansion Order).

advancements, cost reductions, and reduce greenhouse gas emissions for O&R's entire service territory."⁴¹

The AMI Expansion Order increased the AMI program's capital expenditure cap to \$98.5 million.⁴² It provided that if the actual electric or gas AMI net plant balances exceed the AMI net plant targets established in the Company's current rate plan, the Company would be allowed to defer the revenue requirement impact of the amount above the AMI net plant targets, net of any cost reduction benefits realized during that period, until the Commission reset base rates.⁴³

The AMI Expansion Order noted that O&R had filed an updated BCA showing a net present benefit value of \$15.6 million.⁴⁴ The Commission found that the BCA supported its decision to authorize the AMI project's full implementation and increased scope, functionality and cost.⁴⁵

The AMI Expansion Order required O&R to file annual reports containing a detailed itemized breakdown of the amount of AMI expenditures incurred, the amount of cost reduction benefits realized, a comparison of the electric and gas AMI net plant balances and AMI net plant targets, and an earnings computation.⁴⁶ The Order also approved O&R's Customer Engagement Plan jointly submitted with Con Edison, finding that customer

⁴¹ AMI Expansion Order, pp. 16-17.

⁴² AMI Expansion Order, pp. 24-25.

⁴³ AMI Expansion Order, p. 18.

⁴⁴ AMI Expansion Order, pp. 17-18; see Cases 14-E-0493 and 14-G-0494, supra, Orange and Rockland Utilities, Inc. Advanced Metering Infrastructure Benefit Cost Analysis Benefit Summary and Advanced Metering Infrastructure Benefit Cost Analysis Matrix (July 29, 2016).

⁴⁵ AMI Expansion Order, p. 18-19.

⁴⁶ AMI Expansion Order, pp. 18-19.

outreach and education at all phases of deployment to be integral to the program's success.⁴⁷

The AMI Expansion Order did not approve any change to O&R's existing rate plan established in the 2015 Rate Order or otherwise authorize any further recovery of AMI expansion costs either in then-current rates or by implementation of a surcharge. Instead, it expressly provided for O&R's deferral of AMI capital expenditures in excess of the \$28.1 million allowance in O&R's existing rate plan. The Commission explicitly noted in the Order that any AMI-related costs "are subject to further review in O&R's next base rate proceeding."⁴⁸

Kopald Petition for Rehearing of AMI Expansion Order

On December 18, 2017, Ms. Kopald filed a petition for rehearing of the AMI Expansion Order (Kopald Rehearing Petition), which asserted, among other things, that O&R's petition should have been subject to a hearing under Public Service Law (PSL) § 66(12)(f). The Kopald Rehearing Petition alleged that the AMI Expansion Order constituted a "major change" in rates and revenues by effectively approving recovery of expenditures for the AMI Program's smart meters and opt-out fees in future rates.⁴⁹ The Rehearing Petition also alleged that smart meters had "hidden charges" that would be borne by ratepayers, which O&R had not disclosed or addressed. The petition asserted that smart meters overbilled customers and

⁴⁷ AMI Expansion Order, p. 20.

⁴⁸ AMI Expansion Order, p. 20.

⁴⁹ Case 17-M-0178, supra, Petition for Rehearing (December 18, 2018), pp. 1-5.

consumed additional energy.⁵⁰ It complained that there was a lack of evidence that smart meters would result in the cost and energy savings O&R claimed.⁵¹ The Petition challenged the costs associated with AMI implementation as not prudent.⁵²

The Kopald Rehearing Petition claimed that smart meters had unacceptable levels of conducted emissions and presented a health threat, particularly to the disabled and those with electro-sensitivity.⁵³ The Petition alleged that smart meters could interfere with certain equipment and communications devices and posed a risk of fire.⁵⁴ It argued that O&R failed to budget for the costs of these health and other risks and that the risks should have triggered environmental impact review under the State Environmental Quality Review Act (SEQRA).⁵⁵ The Kopald Rehearing Petition requested that the expansion of AMI into Orange and Sullivan Counties cease until a rate hearing is held.⁵⁶

Commission Order Denying Kopald Rehearing Petition

On May 21, 2018, the Commission denied the Kopald Rehearing Petition in its entirety (Rehearing Order).⁵⁷ The

⁵⁰ Kopald Rehearing Petition, pp. 8-9. Ms. Kopald claimed that smart meters could overcharge customers by 7-8 percent.

⁵¹ Kopald Rehearing Petition, pp. 3-4.

⁵² Kopald Rehearing Petition, pp. 8-9.

⁵³ Kopald Rehearing Petition, pp. 8-13.

⁵⁴ Kopald Rehearing Petition, pp. 10-11.

⁵⁵ Kopald Rehearing Petition, pp. 13-17. The Kopald Rehearing Petition also asserted violations of the federal Fair Housing Act and Americans with Disabilities Act from the use of smart meters.

⁵⁶ Kopald Rehearing Petition, p. 6.

⁵⁷ Case 17-M-0178, supra, Order Denying Rehearing Petition (issued May 21, 2018).

Commission ruled that its approval of the AMI expansion did not constitute a "major change" in rates requiring a hearing within the meaning of PSL § 66(12)(f).⁵⁸ The Commission deemed speculative, factually inaccurate, or already decided in the 2015 Rate Order the Kopald Rehearing Petition's claim that O&R's revenues would increase as a result of the AMI program to such an extent that the increase would constitute a "major change" in rates requiring a hearing.⁵⁹ The Commission rejected the Petition's claim that the AMI program would be a significant source of revenue for O&R.⁶⁰ The Commission found that the deferral of AMI expenses for future recovery in the next rate proceeding was not itself a major change requiring a hearing and that the subsequent rate proceeding would provide a hearing on the collection from customers of any deferred AMI expenses.⁶¹ The Commission also rejected the argument that the opt-out charges were "new" and therefore required a hearing, stating that the 2015 Rate Order had already approved those charges.⁶²

Relying on O&R's representation that the power supply for smart meters "is located ahead of the meter's current sensing devices," and that the power consumed "is taken before measuring the energy usage and therefore is not billed to the customer," the Commission rejected Ms. Kopald's argument that

⁵⁸ Rehearing Order, pp. 10-11. The Commission cited the definition of "major changes" in PSL § 66(12)(c), which includes "an increase in the rates and charges which would increase the aggregate revenues of the applicant."

⁵⁹ Rehearing Order, p. 11.

⁶⁰ Rehearing Order, p. 11.

⁶¹ Rehearing Order, pp. 11-12. The Commission also rejected the claims that the State Administrative Procedure Act § 301 and SEQRA required a hearing.

⁶² Rehearing Order, p. 11.

smart meters consume more electricity resulting in additional hidden charges to customers.⁶³

The Commission found that the petition's claims that the proposed smart meters are not compliant with Federal Communications Commission regulations or are otherwise unsafe to be without merit because Staff had thoroughly tested both types of meters O&R intended to use and had determined that they met federal standards.⁶⁴ The Commission noted that the World Health Organization has found no scientific basis linking electromagnetic hypersensitivity symptoms resulting from radiation exposure.⁶⁵ The Commission also noted that it already had determined in a separate rate proceeding involving another utility that smart meters pose no credible threat to the health and safety of customers.⁶⁶ The Commission found no basis to require SEQRA review due to health and safety concerns.⁶⁷

⁶³ Rehearing Order, pp. 5-7.

⁶⁴ Rehearing Order, pp. 12-15. In a separate proceeding, the Commission approved the smart meters O&R intended to use. See Case 16-E-0242, Aclara Technologies - Meter Approval, Order Approving Aclara I-210+C Residential Electric Meter with Silver Spring Technologies NIC 511 Communication Card (issued January 27, 2017); and Case 16-E-0366, Aclara Technologies - Meter Approval, Order Approving Aclara kV2c Electric Meter with Silver Spring Technologies NIC 511 Communication Card (issued February 24, 2017).

⁶⁵ Rehearing Order, pp. 12-15.

⁶⁶ Rehearing Order, pp. 12-15; Case 14-M-0196, Central Hudson Gas & Electric Corporation - AMI Opt-Out, Order Granting, In Part, And Denying, In Part, Requests for Modifications of Opt-Out Tariff (issued October 20, 2017) (Central Hudson Order).

⁶⁷ Rehearing Order, pp. 12-13.

O&R's AMI Testimony in These Rate Proceedings

In these proceedings, O&R proposes to recover in rates expenditures for, among other things, AMI implementation in its entire service area. Specifically, O&R seeks approval of AMI-related costs totaling \$65.516 million through 2020, including \$34.885 million for electric capital expenditures and plant additions and \$30.631 million for common capital expenditures and plant additions.⁶⁸ Pursuant to a June 15, 2018 update, O&R reduced the total amount of AMI-related costs from \$65.516 million to \$50.162.⁶⁹ O&R also seeks approval to continue the AMI/AMR meter opt out fees first adopted in the 2015 Rate Order for Rockland County.⁷⁰

DPS Staff's AMI Testimony

The testimony of DPS Staff's Electric Infrastructure and Operations (EIO) Panel indicates that O&R's proposed budgets for AMI project costs are within the total amount approved in the AMI Expansion Order.⁷¹ Staff also indicates that the AMI deployment is on schedule and that "the project costs included in the capital budget are reasonable" based on historic costs.⁷²

Kopald Testimony

In her testimony, Ms. Kopald first asserts that a public hearing was required in the AMI Expansion Proceeding and

⁶⁸ See O&R Exhibit AP-E4, Schedules 1-4. Included in those expenditures are costs for operation and maintenance, customer engagement, and for computer main frame upgrades to support data growth requirements. O&R Accounting Panel, p. 28, Exhibit AP-E4, Schedule 5.

⁶⁹ See O&R Exhibit AP-E4, Schedules 1-4 (June 15, 2018 Update).

⁷⁰ O&R Accounting Panel Testimony, p. 46.

⁷¹ Staff EIO Panel Testimony, p. 20.

⁷² Staff EIO Panel Testimony, p. 20.

that the AMI Expansion Order “means *ipso facto* [cost] recovery will be eventually approved,” and that recovery of AMI costs “is largely a *pro forma* exercise.”⁷³ Second, Ms. Kopald argues that there is no evidence that electricity usage will be lessened or that any cost savings benefit will be realized by customers from the use of smart meters.⁷⁴ Third, she claims that smart meters have reliability and accuracy issues.⁷⁵

Fourth, Ms. Kopald asserts that smart meters present privacy and security risks that have not been addressed.⁷⁶ Fifth, she alleges that the meters pose health risks, that the costs associated with opting out of them has not been disclosed and, in any event, opting out does not resolve the stray emissions, radiation sensitivity and other systemic issues associated with smart meters.⁷⁷ Sixth, Ms. Kopald claims that O&R has made representations about the functionality of AMI technology in the absence of data to back up such claims and has downplayed the acceptable performance of the old metering technology.⁷⁸ Finally, Ms. Kopald references a judicial challenge she intends to bring as a result of the AMI Expansion Order and argues that a rate increase should not occur until the

⁷³ Kopald Testimony, pp. 3-4.

⁷⁴ Kopald Testimony, pp. 5-7; 18-20.

⁷⁵ Kopald Testimony, pp. 7-13; 16-18.

⁷⁶ Kopald Testimony, pp. 8-9.

⁷⁷ Kopald Testimony, pp. 10-17, 22-24. Ms. Kopald claims that O&R has not been forthcoming about the health risks associated with AMI and avoids researching the risks that it has reason to be aware of.

⁷⁸ Kopald Testimony, pp. 18-22.

procedural and fact issues raised in her rehearing petition and the Rehearing Order are resolved by a court.⁷⁹

PARTIES' POSITIONS ON MOTION TO STRIKE THE KOPALD TESTIMONY

O&R's Motion to Strike

In its motion to strike, O&R asserts that the Kopald testimony is "wholly improper" because it fails to address issues relevant to these rate proceedings and because it seeks to relitigate issues the Commission already has decided in the AMI Expansion Order and the Rehearing Order.⁸⁰ O&R asserts that the issues already decided include "the electricity usage of AMI meters, the reliability of AMI meters, alleged privacy and health concerns relating to AMI meters, and the functionality of analogue meters."⁸¹

Kopald Response to Motion to Strike

Ms. Kopald responds to O&R's motion by asserting that her testimony discusses AMI costs, which may be challenged in these proceedings.⁸² To support this assertion, she cites the language in the Commission's AMI Expansion Order that deferred approval of AMI expenditures until the next rate proceeding. Ms. Kopald argues that the AMI Expansion Proceeding "should have been a rate hearing, which would have involved a mandatory public hearing upon notice to the public and concomitant evidentiary hearing" (emphasis in original).⁸³ She claims that "the time to discuss all aspects" of AMI is in these proceedings

⁷⁹ Kopald Testimony, pp. 24-29.

⁸⁰ O&R Motion to Strike, p. 1.

⁸¹ O&R Motion to Strike, p. 2.

⁸² Kopald Response to Motion to Strike, pp. 1-2.

⁸³ Kopald Response to Motion to Strike, pp. 4-5.

and that the AMI issues that have "not been fully litigated" include whether O&R's AMI Expansion Proceeding should have been a rate hearing and whether AMI charges are sufficiently high to be a major change in rates requiring a public hearing.⁸⁴

Ms. Kopald argues that the other issues appropriate for consideration in these rate proceedings include whether the Commission erred in approving AMI in light of smart meter performance and the health, safety, fire and explosion risks posed, and whether the Commission's decision to allow AMI expansion is exempt from SEQRA under 16 NYCRR § 7.2.⁸⁵

No other party filed a response to O&R's motion.

DISCUSSION

As our recitation of the procedural history of O&R's AMI program illustrates, the Commission already has approved the scope and budget of O&R's enhanced and expanded AMI program and has authorized O&R to move forward to implement it. What has been left for this proceeding is the establishment of rates necessary to compensate O&R for the program. The issues to be considered in these proceedings with respect to a review of AMI costs are limited to whether incurred AMI expenditures were prudent and within the approved budget cap set forth in the AMI Expansion Order, whether O&R's forecasted expenditures are consistent with that Order and its budget, and whether the proposed revenue allocation and rate design for AMI are fair and reasonable. Contrary to the arguments in the Kopald testimony, the AMI Expansion Order cannot be read to mean that the Commission intended to simply rubber-stamp the pass-through of all AMI expansion costs into rates. The AMI Expansion Order

⁸⁴ Kopald Response to Motion to Strike, p. 6.

⁸⁵ Kopald Response to Motion to Strike, p. 10.

expressly deferred until this rate case the Commission's consideration of the AMI expansion costs and their incorporation into rates. The ultimate issue the Commission must determine in these proceedings is whether O&R's proposed rates, including the AMI expansion expenditures, are just and reasonable and in the public interest.⁸⁶ O&R has the burden of proving that proposed rates meet the just and reasonable standard.⁸⁷

The AMI Expansion Order did not alter O&R's burden to make a sufficient showing here that AMI costs should be passed on to O&R's customers in rates. However, in the AMI Expansion Order, the Commission made the policy determination that O&R should implement AMI and established the scope and extent of such implementation. Those policy determinations have already been made and are not at issue in this proceeding. The Kopald testimony is essentially a broad attack on those prior Commission determinations. The Commission's policy determinations and the issues resolved in prior proceedings, including the technical aspects of smart meters and O&R's AMI program, may not be challenged in these rate proceedings. Because most of the points proffered in the Kopald testimony address previously decided policy issues, we find it to be outside the scope of the issues properly that may be considered here. We discuss these issues in turn, below.

AMI Program Costs

In this case, O&R presented evidence asserting that its AMI expenditures have been and are forecast to be consistent with the program approved by the Commission.⁸⁸ Consequently, O&R

⁸⁶ PSL § 65(1).

⁸⁷ PSL § 66(12)(i), 16 NYCRR § 61.1.

⁸⁸ O&R Accounting Panel, Exhibit AP-E4, Schedules 1-4.

met its burden to make a prima facie showing of entitlement to recover those AMI costs in rates. As noted above, DPS Staff's testimony in response indicates that the AMI program is on schedule, that the expenditures are within the amount approved in the AMI Expansion Order, and that the project costs included in O&R's capital budget are reasonable based on a review of historic costs.⁸⁹ Notably, the Kopald testimony fails to present or develop cost-related evidence to rebut O&R's prima facie showing or to call into question DPS Staff's testimony. The testimony questions whether costs have been properly itemized⁹⁰ and asserts that O&R's presentation fails to disclose "hidden" costs, but does not allege that AMI costs were imprudently incurred or are over budget. Indeed, it does not directly challenge AMI costs at all. The Kopald testimony must do more than make conclusory allegations about AMI costs. Ms. Kopald has not established a basis here to shift the obligation to O&R for it to further demonstrate the prudence of AMI costs already incurred or forecast to be incurred.

The Kopald testimony questions whether "costs" related to safety, privacy and security risks have been disclosed and addressed.⁹¹ In addition to being unsupported by evidence, these allegations refer to societal costs associated with AMI, not the actual and forecasted costs to be incurred by O&R and passed on to ratepayers via the rates established in this case. These are not the sort of "costs" the Commission intended to be considered here when it deferred review of AMI costs in the AMI Expansion

⁸⁹ DPS Staff EIO Panel, p. 20.

⁹⁰ Kopald testimony, pp. 3-4.

⁹¹ Kopald testimony, pp. 8-10, 13 (additional AMI costs related to safety, privacy and security risks); pp. 18-21 (comparison of costs of analog meters versus smart meters).

Order. Rather, such societal costs relate to policy determinations that the Commission has already made.

"Major Change" in Rates and Revenues

The Kopald testimony repeats in this proceeding the argument first made in her Rehearing Petition that a rate hearing was required before the Commission authorized full AMI deployment because that action resulted in a "major change" in rates and revenues within the meaning of PSL § 66(12).⁹² Although the Kopald testimony acknowledges that this issue may be raised in a judicial challenge to the Commission's Rehearing Order, it nevertheless asserts that this same issue should be addressed in these proceedings. This is not the appropriate forum in which to challenge purported defects in the Rehearing Order. That Order rejected Ms. Kopald's argument that the Commission's approval of AMI represented a major change in rates and revenues as well as her statutory interpretation of PSL § 66(12).⁹³ Accordingly, this issue is not appropriate for consideration here.

Safety of Smart Meters

The Kopald testimony challenges the safety of smart meters, claiming that they emit unacceptable levels of electromagnetic radiation that can cause health impacts.⁹⁴ In its Rehearing Order, the Commission rejected that argument and determined that the smart meters O&R proposed to use were tested and approved by DPS Staff, who found them compliant with

⁹² Kopald testimony, pp. 24-29.

⁹³ Rehearing Order, pp. 10-11.

⁹⁴ Kopald testimony, pp. 10-17.

applicable Federal Communications Commission's standards.⁹⁵ The Rehearing Order also recited the Commission's prior order in the Central Hudson Gas & Electric Corporation rate case,⁹⁶ which relied on the findings of the World Health Organization that there is no scientific basis to link electro-sensitivity to radiation.⁹⁷ Smart meter health and safety issues were decided by the Commission in the Rehearing Order and are precluded from being raised in these proceedings.

Customer Cost and Energy Savings

The Kopald testimony questions whether smart meters have resulted in energy savings or cost savings for customers.⁹⁸ The 2015 Rate Order required O&R to have a separate net plant reconciliation mechanism for AMI expenditures and a "savings tracker" showing the actual as compared to the projected energy savings.⁹⁹ In addition, the AMI Expansion Order required O&R to file an annual report with a detailed itemized breakdown of the amount of AMI expenditures incurred, the amount of cost reduction benefits realized, a comparison of the electric and gas AMI net plant balances to the AMI net plant targets, and an earnings computation.¹⁰⁰ These required measures provide answers to some of the cost-related questions posed by the Kopald testimony, but this is not the forum in which energy or cost

⁹⁵ Rehearing Order, pp. 12-15.

⁹⁶ Case 14-M-0196, supra, Central Hudson Gas & Electric Corp. - AMI Opt-Out, Order Granting in Part and Denying in part Requests for Modifications of Opt-Out Tariff (issued October 20, 2017).

⁹⁷ Id.

⁹⁸ Kopald testimony, pp. 3-8; 18-19; 26.

⁹⁹ 2015 Rate Order, p. 15 & Joint Proposal, p. 21.

¹⁰⁰ AMI Expansion Order, p. 19.

savings should be aired because the Commission has already determined those issues in the 2015 Rate Order and the AMI Expansion Order.

Benefit/Cost Issues

The Kopald testimony also questions whether the AMI program's costs outweigh its benefits.¹⁰¹ The Commission's 2015 Rate Order first decided benefit/cost issues and found that AMI's benefits outweighed the costs.¹⁰² In reaching that determination, the Commission relied on O&R's preliminary benefit cost analysis, on DPS Staff's assertion that "the Company had exercised best efforts to produce reasonable estimates of costs and savings,"¹⁰³ and on the requirement that O&R submit an updated and refined benefit cost analysis.¹⁰⁴ The Commission's AMI Expansion Order revisited the benefits and costs associated with AMI expansion, discussed O&R's updated and refined benefit and cost analysis, and settled the issue.¹⁰⁵ This issue relates to the Commission's policy determination to deploy AMI and is not within the scope of these proceedings.

Smart Meter Accuracy and Overbilling

The Kopald testimony asserts that smart meters are not accurate and can overbill customers, citing one study showing evidence of overbilling for buildings with lighting dimmers.¹⁰⁶ The Commission addressed this question in the Rehearing Order

¹⁰¹ Kopald testimony, pp. 3-7.

¹⁰² 2015 Rate Order, pp. 15-16.

¹⁰³ 2015 Rate Order, p. 16.

¹⁰⁴ 2015 Rate Order, p. 15 & Joint Proposal, pp. 58-60.

¹⁰⁵ AMI Expansion Order, pp. 17-18.

¹⁰⁶ Kopald testimony, pp. 21-22.

when it recounted DPS Staff's thorough meter testing under 16 NYCRR § 93 and the Commission's approval in a separate proceeding of the specific Aclara meters O&R intended to use.¹⁰⁷ Issues associated with smart meter accuracy and overbilling may not be raised here.

Privacy and Security

The Kopald testimony also raises privacy and security issues related to smart meters.¹⁰⁸ The Kopald testimony questions whether the cost of these risks have been disclosed and addressed in these proceedings.¹⁰⁹ Separate from the AMI Expansion Proceeding, O&R has an obligation to protect its customers' privacy.¹¹⁰ The Commission imposed further privacy and security protections for the AMI program in the 2015 Rate Order, which required O&R to develop an AMI Business Plan that included, among other things, "privacy principles."¹¹¹ O&R's AMI Business Plan addresses privacy and security issues through data encryption, firewalls, and other measures.¹¹² O&R's Customer Engagement Plan contains additional details about how customer privacy will be protected, and places control of data sharing and personal privacy information in the hands of customers.¹¹³

¹⁰⁷ Rehearing Order, pp. 13-14, n. 15.

¹⁰⁸ Kopald testimony, pp. 8-9.

¹⁰⁹ Kopald testimony, pp. 8-10.

¹¹⁰ Case 13-M-0178, In the Matter of a Comprehensive Review of Security for the Protection of Personally Identifiable Customer Information, Order Directing the Creation of an Implementation Plan (issued August 19, 2013).

¹¹¹ 2015 Rate Order, p. 15 & Joint Proposal, p. 60.

¹¹² Case 14-E-0493, supra, AMI Business Plan, pp. 22; 24-26.

¹¹³ Case 13-E-0030, supra, O&R/Con Edison AMI Customer Engagement Plan, pp. 100-112.

DPS staff analyzed the AMI Business Plan and the Customer Engagement Plan and the Commission considered both in issuing the AMI Expansion Order. Consequently, privacy and security issues have already been addressed and are outside the scope of these proceedings.

Opt-Out Fees

The Kopald testimony challenges the fees charged to disabled customers who opt out of smart meter installation, claiming that the Americans with Disabilities Act (ADA) prohibits charging such opt-out fees for those "who need accommodation for their disability."¹¹⁴ She argues that the fee is therefore discriminatory.

As discussed above, the scope of this case is limited to the establishment of rates that will compensate O&R for implementation of an AMI program that has been pre-approved in terms of scope and budget. Notwithstanding that the 2015 Rate Order included opt-out fees approved by the Commission, in our view the design of rates is squarely within the scope of any rate case. Therefore the rate design of opt-out fees is appropriately raised by Ms. Kopald, and we reject O&R's contention that the issue is irrelevant here. We make no determination regarding the applicability or relevance of the ADA to the design of the opt-out fee. As a legal issue, it can be addressed by parties in briefing as they deem necessary or appropriate.

¹¹⁴ Kopald testimony, p. 29.

CONCLUSION

The Commission has already considered and decided most of the issues raised in the Kopald testimony. It is true that the Commission may revisit and revise prior determinations in a subsequent proceeding, as long as the Commission provides a reasoned explanation for changing its prior decision and meets any applicable notice requirements before acting. Here, there has been no indication that the Commission intends to revisit its authorization of the AMI program. A subsequent rate proceeding cannot be used to circumvent proper procedural avenues for challenging prior Commission orders, particularly when there is no indication that the Commission is inclined to revisit previously decided issues.

Instead, the issues in these rate proceedings are limited to the ratemaking mechanics of incorporating the AMI expenditures into rates, albeit with the opportunity to review the expenditures for their reasonable conformance with the prior Commission approval in the AMI Expansion Order. As discussed, we find that the only issue raised in the Kopald testimony that is properly within the scope of these proceedings is the design of the opt-out rate, including whether it is discriminatory or violative of the ADA. Although the other issues presented in the Kopald testimony are not within the scope of these rate proceedings, we nevertheless exercise our discretion to decline to strike the testimony from the record. Rather, we will afford it only the weight that is consistent with this ruling.

(SIGNED)

MAUREEN F. LEARY

(SIGNED)

DAKIN D. LECAKES