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.

MOTION FOR INTERLOCUTORY REVIEW

I. On 6/15/2018, O&R filed a motion to strike my testimony (document No. 46); I answered on 7/6/18 (No.52) I seek an interlocutory review on the portion of the 9/10/18 ruling on O&R's motion to strike defining costs (document No. 75)

The gravamen of O&R's complaint in its motion was that I sought

> to relitigate certain Advanced Metering Infrastructure ("AMI") related issues that were recently and definitively decided by the commission
>
> p1 ¶2 O&R Motion to Strike Kopald Testimony

I responded to O&R by pointing to the verbiage in the 11/16/18 order in 17-M-0178 that specifically said that costs were to be reviewed:

> Further, to ensure that the benefits of AMI deployment materialize, we are implementing a cap on the capital expenditures associated with the AMI project. The capital expenditures will be capped at the Company's estimated AMI project cost of $98.5 million. *In addition, all costs associated with this project are subject to further review in O&R's next base rate proceeding*.
>
> (Emphasis Added)

O&R, having never brought up the 11/16/18 order, never argued about the definition of costs. O&R's argument was that issues regarding AMI had been previously litigated and could not be addressed in this rate hearing. At no point did O&R make a distinction between accounting costs versus health costs, privacy costs, unrealized benefits and the like. This was not addressed until the Administrative Law Judges' 9/10/18 ruling on O&R's motion. In other words, there was no argument over the definition of costs occurring with O&R; the point they asserted was they had permission to go ahead with the rollout so ipso facto, discussion of AMI in my testimony was invalid; my point was that since costs were to be reviewed in this hearing, my testimony was in

fact valid; it was not necessarily possible to imagine ahead of time that the ruling on this motion which was on whether or not to strike the testimony, was going to contemplate how to define the word costs, which has not been statutorily defined by the Commission.

Meanwhile, in subsequent motions which were long pending by the time the 9/10/18 ruling came out, I sought to compel responses to interrogatories because I had been told verbally and in writing that my interrogatories "went beyond the scope of the proceedings" and/ or were not related to AMI costs; ergo, once this issue had been raised directly, I *specifically* addressed the issue of "costs" in pending motions. In my Motion to Compel Response to Interrogatories O&R IR Set 1 (from D. Kopald to O&R) (Document No. 69), filed on 8/27/18, I wrote the following:

> Order 17-M-0178 contemplated a review of AMI costs in this proceeding…..
> ……O&R has not broken down all of these costs for review and resists doing so. Costs include but are not limited to accounting costs, economic externalities (which include public health) which are not accounted for on an accounting statement and unrealized benefits. *So-Lo Oil Co., Inc. v. Total Petroleum, Inc*, 832 P.2d 14 (Supreme Court of Oklahoma, 1992), stands for the proposition that absent a concrete definition, one cannot imagine that the term "costs" refers to a specific accounting procedure:
>
> > *We agree that general accounting methods may be appropriate to interpret a statutory cost definition, but this jurisprudence does not teach that accounting rules may be fashioned to supply the definition where legislative silence prevails.*
>
> An unrealized benefit that is claimed from a boondoggle is similarly a cost. Likewise *Board of County Com'rs of Leavenworth County v. McGraw Fertilizer Service, Inc.*, 261 Kan. 901, 933 P.2d 598 (Supreme Court of Kansas, 1997) speaks to the issue of lack of a legislative definition of the term costs
>
> > In the absence of evidence of legislative intent regarding the meaning of "retail cost when new," the court construes the words based upon what the words imply to persons of common understanding, not upon an accounting procedure.
>
> Id 261 Kan. 901 at 913
>
> Health costs are costs to persons of common understanding, because anyone whose health has been impacted by an environmental toxin, anyone with a family member whose health has been impacted by an environmental toxin and any insurance company

insuring any such people is well aware of these costs (and in fact, an insurance company[1] would deem them accounting costs). Exhibit 1 constitutes IR Set 1; O&R's reproduction of the questions was not always accurate (see esp. O&R IR Set 1-6) and this document should be referred to for the original questions. Note also there are multiple questions per exhibit (the questions in each roman numeral section are in the same exhibit; they are numbered sequentially within the exhibit; however, they are not always referred to sequentially below).

Pages 1-2 Motion to Compel Response to Interrogatories O&R IR Set 1 (from D. Kopald to O&R)

In my Motion to Compel Response to Interrogatories DPS IR Set 1 (from D. Kopald to DPS),

(Document No. 71) I wrote:

> O&R assumes that by merely repeating their claim in response to subsequent motions that the new testimony was invalid, concomitant with a typical response made to convince a judge to overlook a non-lawyer pro se party's argument by describing the filer as extreme (see below excerpt from footnote 1, page 3 of O&R's response to Pace's motion)…..
>
> > Ms. Deborah Kopald, took it upon herself to file a 23 page Motion to Admit the Testimony of Dr. Timothy Schoechle and Dr. David O. Carpenter and Other Exhibits. This testimony and exhibits exceeded **700 pages** in length.
>
> …….that they could avoid dealing with the fact that a major paper was published in July 2018 which provides further international consensus that (1) there are is a statistically significant portion of the population that is severely overtly affected by electromagnetic radiation; that (2) there is now an accepted empirical basis to support these claims; that (3) electromagnetic radiation creates a serious public health risk and (4) that smart meters are part of that risk; and that the dosimetry previously documented is in line with negative health consequences documented in that paper from both devices and infrastructure. In other words, rather than dealing with the substance of my motion (or most interrogatory request), O&R unilaterally declares them to be "not relevant". O&R is similarly trying to avoid dealing with testimony regarding new information that suggests there is a serious data privacy risk and that the AMI program does not provide the benefits claimed to the ratepayer, which is the *sine qua non* for putting AMI costs in rate base. Unrealized benefits/ benefits that are claimed to exist that do not in fact and will not in fact come to fruition because of the nature of the AMI program are an obvious cost and are subject to review.
>
> I am asking to look at costs on the basis of new information as well as on the basis of information that the DPS may have and has not disclosed. That is the purpose of *this* motion. The cost benefit analysis for which information has not been provided is thus relevant, especially before the newly approved subsequent rollout of AMI in the service territory which O&R itself **admits** was mostly not pre-approved in a prior rate hearing,

[1] It is worth noting that Lloyd's of London declines to re-insure Electromagnetic field risk (including smart meters, Wi-Fi, cell phones, Bluetooth etc.) which suggests they may have a view that the costs of their use are enormous.

but was largely approved as a result of their petition in 17-M-0178, which provided no tangible evidence or any documented updates to back up wishful assertions they had made in a previous rate hearing about the so-called benefits (See page 3, ¶1 of O&R's response to my motion to compel responses from the first IR set):

> In aggregate, the Company estimated the incremental capital investments associated with the AMI implementation to be *$74.3 million above what was approved by the Commission in the 2015 Rate Order*, resulting in an overall capital investment of $98.5 million. The Company also requested approval of its AMI Customer Engagement Plan.
>
> (Emphasis Added)

O&R has adduced no legal argument whatsoever that costs encompass things other than accounting costs[2].

So-Lo Oil Co., Inc. v. Total Petroleum, Inc, 832 P.2d 14 (Supreme Court of Oklahoma, 1992), stands for the proposition that absent a concrete definition, one cannot imagine that the term "costs" refers to a specific accounting procedure:

> *We agree that general accounting methods may be appropriate to interpret a statutory cost definition, but this jurisprudence does not teach that accounting rules may be fashioned to supply the definition where legislative silence prevails.*

An unrealized benefit that is claimed from a boondoggle is similarly a cost. The reason why it is a cost is that the DPS ordered the smart meter program to continue to be rolled out on the basis of statements made by O&R that do not demonstrate any cost savings and were accepted uncritically. The ratepayer will thus be left paying for something without getting a benefit; things that are passed onto the ratepayer are supposed to occur if the ratepayer is benefitting. If not, the ratepayer is then left bearing extra costs (the unrealized benefit plus the rate increase). If the DPS went *ex parte* with O&R or had any communications at all (whether they are considered public or private) during the 17-M-0178 proceeding without having a public hearing and potential for an evidentiary hearing,

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[2] I am bringing up O&R's objections to a motion to compel information to pre-empt a similar argument from the DPS inasmuch as I have oft- stated and it seems obvious that O&R and the DPS work very closely together. When I have asked the DPS for information, they tell me to go to O&R, and tried to first tell me that the information couldn't be obtained. Then O&R produced some of what had already been produced to another party and then a little more last Friday near close of business day after I had complained that both the DPS and O&R are thwarting a proper review of costs.

Most note-ably, both the DPS and O&R appear to take the position that they do not have to fully answer questions about the AMI program (a position which I assert contravenes the DPS' order in 17-M-0178); full accounting costs have not been provided, nor has any accounting of claimed benefits been made. This is especially important when there is new evidence that the claimed benefits do not exist and other evidence of enormous hidden costs.

I have been consistent in my public statements that preceded this hearing that the DPS acts like an arm of O&R and does not independently regulate it. In any event, it should not be in dispute that O&R and the DPS's positions are almost if not actually identical that they do not want a full cost review of AMI in this proceeding, even though the Commission's order allows it.

this information should be examined as part of a review of costs. If the DPS took their own internal notes without communicating with O&R and had a rationale for accepting that these benefits exist when evidence (including the new testimony I have sought to be admitted) suggests they do not, then this information should be produced and scrutinized in a review of "all costs" referred to in the Commission's order in 17-M-0178. If they have adduced any information *since* 17-M-0178's order related to these questions, they should disclose it. Most note-ably, if there are not cost savings and the smart meter program either does not create benefits in the form of monies saved or other benefits to the ratepayer, including but not limited to a reduction in electricity use and greenhouse gasses, then some or all of the net regulatory assets that are part of the AMI program should not be put in rate base at all and the costs should not be passed along to the ratepayer. Neither should AMI costs sought to be recovered be paid for by the ratepayers.

Pages 1-2 Motion to Compel Response to Interrogatories
DPS IR Set 1 (from D. Kopald to DPS)

The DPS appears to think that since they approved the further rollout of smart meters (in a proceeding that was not a rate hearing and had no evidentiary hearing), that a review of costs (which again, include all costs, *including all costs to the ratepayer*) either does not need to occur or can be given a lick and a promise as a rubber stamp exercise. It appears that the DPS thinks that since they approved a further rollout, $98.5 million must go through and/or it must be charged to the ratepayer no matter what evidence has materialized since that demonstrates that claims they may have relied upon from O&R are false and that AMI hurts the ratepayer. Surely a massive miscalculation could be the basis for not modifying the financing for, if not change the actual program that would involve $98.5 million in costs over 20 years to be borne by the ratepayers and could be the basis for a claim that the program is contrary to the public interest. Certainly any misrepresentations by O&R to the DPS regarding any costs, health risk, accounting costs, or falsely stated benefits to the ratepayer should be the subject of a review in these proceedings. Costs are not merely accounting costs and without specificity on this point by the Commission's order, the DPS cannot legitimately claim that this review should merely be limited to accounting costs.

Board of County Com'rs of Leavenworth County v. McGraw Fertilizer Service, Inc., 261 Kan. 901, 933 P.2d 598 (Supreme Court of Kansas, 1997) speaks to the issue of lack of a legislative definition of the term costs:

> In the absence of evidence of legislative intent regarding the meaning of "retail cost when new," the court construes the words based upon what the words imply to persons of common understanding, not upon an accounting procedure.

Id 261 Kan. 901 at 913

Health costs are costs to persons of common understanding, because anyone whose health has been impacted by an environmental toxin, anyone with a family member whose health has been impacted by an environmental toxin and any insurance company

> insuring any such people is well aware of these costs (and in fact, an insurance company[3] would deem them accounting costs).
>
> Furthermore, unrealized benefits that will not occur are costs of the program; any ratepayer, a person of common understanding, can clearly see that having their rates raised both because the AMI boondoggle is in rate base and because certain costs are sought to be recovered directly from them when all the so-called benefits of the AMI program do not materialize, that is obviously *a cost to them*. So too, is a program that is a serious health risk (regarding which new evidence has been presented that is sought to be admitted); besides the fact that I assert that new evidence exists that shows that the AMI program is not going to save ratepayers money, the needless exposure to radiofrequency (RF) radiation, a neurotoxin and Group 2b carcinogen which the Access Board and the National Institute of Building Sciences recommended in 2005 be avoided in buildings[4] may literally be injury added to insult (paying for a program that will not save any money, not meaningfully save money or may cost the ratepayers more money via overbilling).
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> Pages 5-7 Motion to Compel Response to Interrogatories
> DPS IR Set 1 (from D. Kopald to DPS)

In all my motions to compel, I went on to explain how if there is proof now that AMI is not benefitting the ratepayer, even though there was pre-approval based on statements then that it was benefitting them in a certain way, that there should be consideration for putting the assets and expenses related to AMI in the investor side of the business, and not sticking the ratepayer with the bill. This should be true even if AMI is actually metering electricity; if the externalities and unrealized benefits are too great and electricity can be metered in other ways, including, but not limited to the current way, the question of whether AMI belonging in the formula that allows a rate of return to be collected from the ratepayer should be re-examined. (This formula effectively consists of Net Operating Profit After Tax/Net Regulatory Assets= Rate of Return. The numerator consists in part of the rate increase less expenses from AMI, and the denominator consists in part of AMI assets.)

[3] It is worth noting that Lloyd's of London declines to re-insure Electromagnetic field risk (including smart meters, Wi-Fi, cell phones, Bluetooth etc.) which suggests they may have a view that the costs of their use are un-insurable because they are too great.

[4] United States Access Board/National Institute of Building Sciences Indoor Environmental Quality Report, 2005 http://web.archive.org/web/20060714175343/ieq.nibs.org/ieq_project.pdf, pages 8, 87-88.

II. This interlocutory review is warranted because the issue of what constitutes a cost has affected a subsequent ruling to strike testimony and according to a conference call that took placed on 9/20/18, the Administrative Law Judges have indicated that another ruling to come out soon in response to interrogatory requests will similarly be guided by the 9/10/18 order defining costs

The issue is not one merely of incurring additional workload, which in and of itself would not constitute a valid reason to grant an interlocutory appeal; it is that there is a fundamental principle of law at stake; that the statute does not define "costs" and the ruling did not define costs which were to be reviewed, and the two state Supreme Courts that have weighed in on this issue have clearly stated that in the absence of a legislative definition, costs cannot be assumed to be accounting costs. Common sense would dictate that if it is clear that AMI does not create the benefits stated by the ratepayer, then notwithstanding any previous rulings, common senses would dictate that further approval of a $98.5 million boondoggle a) does not necessarily need to be funded and b) can be put in the investor side of the business instead of the ratepayer side and c) can be the subject of a motion to declare something contrary to the public interest. At any time, a party can file a motion to have something be declared contrary to the public interest. By creating a framework to squelch all discussion of falsities regarding AMI (including, but not limited to economic benefits stated that do not exist, engineering benefits stated that do not exist and health consequences), the rulings effectively stymie such a motion from being fully considered. Evidence presented and failure to justify cost savings suggests that these issues should be examined before this proceeding is closed.

The ruling of 9/10/18 effectively infects all future decisions in this proceeding; however, at a minimum, the stymying of information requested by interrogatories means that information that could now be available that would sharpen all issues in an ultimate final briefing of the joint proposal (for review in an article 78) are not available for consideration. Any future Article 78,

which would re-open this proceeding for a ruling consistent with its findings that costs are no just accounting costs would mean new information that could have been on the record for consideration of the overall issues in the rate hearing will not be before any future body. Interrogatory requests about issues that relate to an expansive definition of costs should be provided; providing information is not going to prejudice O&R or provide irreparable harm to O&R; in this Commission's ruling in 2017 WL 3437452 (In the matter of eligibility *Criteria for Energy Service Companies*), information related to interrogatories was the subject of an order granting an interlocutory appeal. Also in 2007 WL 2780372 (*in Re National Fuel Gas Distribution*), the Commission ruled that responses to interrogatories were necessary to get an expansive record:

> The finding that staff had not met the extraordinary circumstances standard would discourage parties from appealing denial of discovery of most issues in rate cases and could preclude development of more robust records.

The ruling of 9/10/18 goes on to claim that the AMI business plan demonstrated all kind of virtues including privacy (in my motion to admit new testimony, I cited to a Wall Street Journal Article that came out in July announcing that the Department of Homeland Security ("DHS") would have four imminent hearings to deal with the fact that utility data had been hacked; this underscored an issue I had raised which was the costs for any data security program needed to be reviewed to see if it was doing the job claimed; this was especially important in light of recent information, but further important because any review of costs should include a review of whether the functions something was claimed to do actually were manifesting. By O&R's own admission to me in a phone conversation, some assumptions around AMI had changed over time (the fact is, no data whatsoever has been proffered to back up the claims about AMI I had made in my testimony and in motions. A review of costs is not merely to see if the cheapest widget was purchased; in the absence of a statutory definition of costs, it should

encompass a holistic review of the functionality of the item, the claimed benefits, the externalities (negative and otherwise) and the question of whether it benefits the ratepayer or not (in which case it can be stranded, put in the investor side of the business, become the subject of a motion that would declare something contrary to the public interest.

The 9/10/18 ruling largely argues that "this is the way we have been doing things around here for a while" without any citation to case law that would justify the claim that a cost is merely an accounting cost. The ruling refers to discussions about costs in specific contexts, but still does not give any legal argument for why the use of the word costs in the order in 17-M-0178 must only be accounting costs.

For all the aforementioned reasons, I request interlocutory review of the 9/10/18 order and consideration of the proposition that costs cannot be limited to accounting costs and should encompass the holistic view I have outlined herein and in all motions I filed in this case.

Respectfully Submitted,

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