

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

**Proceeding on Motion of the Commission
as to the Rates, Charges, Rules and Regulations
of National Fuel Gas Distribution Corporation
(New York), for Gas Service.**

CASE 16-G-0257

**PUBLIC UTILITY LAW PROJECT OF NY'S OPPOSITION
TO NATIONAL FUEL GAS DISTRIBUTION CORPORATION'S MOTION TO STRIKE
PORTIONS OF PRE-FILED REBUTTAL TESTIMONY OF WILLIAM D. YATES, CPA**

Dated: September 29, 2016

The Public Utility Law Project of NY (“PULP”) respectfully submits this Opposition to National Fuel Gas Distribution’s (“Company”) Motion to Strike Portions of Pre-Filed Rebuttal Testimony of William D. Yates, CPA submitted on behalf of PULP (“Motion to Strike”) pursuant to Rule 3.6 of the Commission’s Rules, 16 N.Y.C.R.R. § 3.6. Your Honors’ e-mail on September 22, 2016 directed written responses to the Company’s motion to be served by close of business on Thursday, September 29, 2016.

We respond as follows:

1. William D. Yates, CPA submitted rebuttal testimony on behalf of PULP on September 16, 2016. We deny the Company’s allegations that the form of his rebuttal is improper, or that his testimony is actually untimely supplemental testimony disguised as rebuttal testimony.
2. The Company seeks to strike portions of Mr. Yates’ rebuttal testimony that are on the following page and line ranges: 1:10-2:8, 3:1-7:11 and 8:13-9:19 (the “Challenged Testimony”).
3. The Company’s primary argument in its Motion to Strike is premised on the assertion that Mr. Yates’ rebuttal testimony is not proper rebuttal in that its purpose is to “bolster existing arguments, not to rebut previously filed facts or testimony.” (Motion to Strike, pg. 2). The Company cites to two NY Court of Appeals cases, and two ALJ rulings on motions to strike rendered in previous cases before the NY Public Service Commission (“Commission”) in support of the arguments in its motion.
4. There is no rule on the proper format of rebuttal testimony in the context of major rate administrative proceedings.
5. The Court of Appeals cases cited by the Company concern criminal appeals wherein the defendants were seeking to overturn their murder convictions in part by alleging certain procedural errors made in the lower court proceedings, including the allowance of allegedly improper rebuttal testimony.¹ Reliance on the rebuttal standard guiding the NY Court of Appeals in these criminal cases as the gold standard in this administrative proceeding is improper.

¹ People v. Jean S. Harris, 57 N.Y.2d 335 (1982); People v. Darrell K. Harris, 98 N.Y.2d 452 (2002).

6. Furthermore, the rulings made by ALJs in two separate Commission proceedings cited by the Company do not support the Company's argument that the Commission has "adopted a position that is in line with the Court of Appeals' view." Neither ruling made by the ALJ in these two cases actually cite to the NY Court of Appeals decisions relied upon by the Company.²
7. Nor has the Company demonstrated that the rebuttal testimony contains information that Mr. Yates could and should have provided with his direct testimony. Mr. Yates' rebuttal testimony is thus completely distinguishable from the information Consolidated Edison Company of New York, Inc. ("Con Ed") attempted to put on the record in Case 08-E-0539 and 08-M-0618, which was found to be inadmissible. In that instance the material proffered by Con Ed would have supplemented the record with information that could have and should have been raised in its pre-filed direct testimony. The practical effect of which would have resulted in unfairly limiting discovery in time for use in the evidentiary hearings and denying opposing parties an opportunity to submit pre-filed direct testimony in response to the late file supplemental direct, contrary to 16 NYCRR 4.5(a).³
8. No similar inequities exist in this case. The arguments contained in Mr. Yates' rebuttal testimony could not be presented in his initial testimony because they are responsive to other parties' direct testimony filed simultaneously with his own. If the rebuttal testimony remains on the record, the Company has a full opportunity for cross examination of Mr. Yates at the upcoming hearing. (Although it is unlikely that the Company will choose to do so since it has already declined to cross-examine Mr. Yates.)
9. By the Company's own admission, the Challenged Testimony the Company moves to strike does not contain new information or evidence. Therefore, PULP cannot understand how Mr. Yates' statements will cause the Company to be unduly prejudiced by the allowance of his rebuttal testimony to remain in the record, regardless of its form.

² Cases 08-E-0539 and 08-M-0618, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric Service*; Case 10-T-0139, *Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City*.

³ 2008 N.Y. PUC LEXIS 786 *14.

10. The Company has not demonstrated that Mr. Yates' rebuttal testimony unfairly undermines the Company's previously submitted evidence in this proceeding. It simply cannot be said that there is any real prejudice to the Company, or the other parties.⁴ Therefore, we question the necessity of the Company's motion, which unfortunately, has the practical effect of increasing the cost of legal services incurred by the Company in preparation for this rate proceeding, the sum of which will be paid for by ratepayers.
11. PULP asserts that any portions of Mr. Yates' rebuttal testimony that could be classified as reiterations or agreements with direct testimony of UIU and DPS Staff are offered with a different perspective based on Mr. Yates' qualifications as an expert witness.
12. Finally, based on his knowledge and experience garnered in his capacity, Mr. Yates' rebuttal testimony serves to contribute to record for the appropriate resolution of this rate case and its primary issues.

PULP respectfully requests that your Honor deny the Company's motion to strike portions of pre-filed rebuttal testimony of William D. Yates, CPA submitted on behalf of PULP in the above-captioned case.

September 29, 2016

Respectfully submitted,

/s/

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⁴ As of PULP's filing of this Opposition, no other active party has submitted a letter in support of the Company's Motion to Strike.