

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 16-G-0257 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of National Fuel Gas Distribution Corp. for Gas Service.

RULING ON MOTION TO STRIKE

(Issued October 3, 2016)

DAKIN D. LECAKES, Administrative Law Judge:

Pursuant to a schedule established by ruling issued June 24, 2016, parties to this proceeding other than National Fuel Gas Distribution Corporation (NFGD or the Company) were to submit testimony establishing their respective cases-in-chief on or before August 26, 2016. Thereafter, all parties, including NFGD, were provided the opportunity to submit rebuttal on or before September 16, 2016. On September 16, in accordance with the procedural schedule, rebuttal testimony was filed by, inter alia, the Public Utility Law Project (PULP) by its witness William D. Yates, CPA. No exhibits were filed in support of any of Mr. Yates' rebuttal. PULP and Mr. Yates had previously provided timely, pre-filed direct testimony and exhibits in this proceeding.

On September 21, 2016, NFGD filed a motion to strike portions of Mr. Yates' rebuttal testimony. NFGD alleges that the portions it seeks to strike "are outside the permissible scope of rebuttal testimony and merely repeat and endorse testimony already in the record." NFGD further states that the specific portions of rebuttal testimony do not introduce any new facts or arguments, and do not contradict any facts set forth by the non-Company parties. By email to all parties to this proceeding dated September 22, 2016, pursuant to 16 NYCRR

§3.6(d)(1), I established September 29, 2016, as the due date for responses to NFGD's motion. PULP filed a timely response. No other party has taken a position on the motion.

NFGD cites two Public Service Commission Administrative Law Judge (ALJ) Rulings to support its motion. The first was issued in a Consolidated Edison Company of New York, Inc. (Con Edison) rate case,¹ and the second in an Article VII case concerning the Champlain Hudson Power Express, Inc. proposed transmission line.² While neither ruling is directly on point, both rulings did grant motions to strike pre-filed testimony that was determined to be improper. Of the two, the Con Edison Ruling concerns facts more similar to those underlying NFGD's motion.

In the Con Edison Ruling granting the motion of Department of Public Service Staff (DPS Staff), the presiding ALJs struck rebuttal testimony offered by Con Edison where the ALJs determined that the purported rebuttal was, in fact, supplemental direct testimony not rebutting any facts or information in the pre-filed record. Instead, Con Edison used the rebuttal phase to provide new evidence that it concededly had in its possession at the time of its initial rate case filing. Con Edison included such material to fill an evidentiary gap in its initial filing that had been brought to its attention by DPS Staff's direct testimony.

In its response, PULP argues that no Commission rule has been established as to the proper format of rate case

¹ Cases 08-E-0539 et al., Consolidated Edison Company of New York, Inc. - Rates, Ruling on Motion to Strike (issued November 4, 2008) (Con Edison Ruling).

² Case 10-T-0139, Champlain Hudson Power Express, Inc. - Application for Certificate of Environmental Compatibility and Public Need, Ruling on Motions to Strike (issued June 22, 2016).

rebuttal. PULP also argues that two Court of Appeals cases cited by NFGD are not controlling inasmuch as they are decisions in criminal proceedings establishing a "gold standard" for criminal trial process. Presumably, PULP makes this argument because the constitutionally protected rights of an accused are not at issue in a rate proceeding. PULP, however, does not offer any support for the proposition that Court of Appeals cases cannot be persuasive in administrative proceedings. PULP also notes that neither of the cases is cited in either of the ALJs' Rulings offered by the Company.

PULP states that because Mr. Yates' rebuttal comments on the testimony offered by other parties at the time PULP also offered Mr. Yates' direct testimony, he could not have provided that testimony at the time of his direct, distinguishing NFGD's motion from the Con Edison Ruling. PULP then notes, however, that to the extent the Company has conceded that there is no new information or evidence in Mr. Yates' rebuttal, NFGD is not "unduly prejudiced" by allowing the testimony, even if improper, to stay in the record.

PULP further states that inasmuch as the Company has failed to establish that the testimony has unfairly prejudiced any party, the motion is a potential waste of resources serving only to increase the rate case expense incurred by NFGD that ultimately is paid by ratepayers. Finally, PULP offers two similar arguments relying on the status of Mr. Yates as an expert, alleging that irrespective of Mr. Yates' concurrence with DPS Staff, he provides "a different perspective" to the testimony than that offered by DPS Staff and his testimony serves to contribute to the record.

By definition, the term "rebut" incorporates some component of refutation or contrariety.³ Moreover, despite PULP's assertion that the Commission has "no rule on the proper format of rebuttal testimony in the context of major rate administrative proceedings," the term "rebuttal" has a specific meaning in the practice of law as "evidence introduced to counter, disprove or contradict the opposition's evidence or a presumption, or responsive legal argument."⁴ To be properly submitted as rebuttal, testimony should do more than summarize another party's position and express the testifying witness's complete support. Many portions of Mr. Yates' testimony cited by NFGD do not rebut any position and are instead designed to signify further support for positions taken by another party to the proceeding. Such positions may be properly supported in post-hearing briefs, but are not rebuttal testimony. Therefore, NFGD's motion is granted.

Turning to Mr. Yates' rebuttal testimony, at page 3, lines 13 through 17 and page 4, lines 1 through 4, Mr. Yates directly quotes DPS Staff's testimony without offering any critical analysis that either refutes or claims any deficiency exists therein. Instead, in both instances the quoted language is immediately preceded by the witness's wholesale endorsement. Moreover, the opening paragraph of the witness's answer, page 3, lines 6-7, states that the recommendations of DPS Staff and the Utility Intervention Unit of the Department of State are "consistent with the findings in my direct testimony"

³ For example, dictionary.com includes the following definitions for "rebut": 1. to refute by evidence or argument; 2. to oppose by contrary proof; and 3. to provide some evidence or argument that refutes or opposes. See <http://www.dictionary.com/browse/rebut?s=t>, last visited September 30, 2016.

⁴ See <http://dictionary.law.com/Default.aspx?selected=1738>, last visited September 30, 2016.

The foregoing examples are in contrast to testimony beginning at page 7, line 1. There, Mr. Yates summarizes DPS Staff's testimony regarding its proposal for a positive performance incentive mechanism related to reducing the Company's uncollectible accounts expense purportedly designed to reduce the number of residential service disconnections made for non-payment of bills. In the follow up question and answer, the witness expresses, with supporting reasons, his dissatisfaction with the DPS Staff proposal and what changes to the proposal Mr. Yates recommends that would make the proposal more acceptable to PULP. Although NFGD has objected to some of these portions of Mr. Yates' rebuttal, it is properly characterized as rebuttal inasmuch as it takes a contrary position to that put forward by DPS Staff. Even where Mr. Yates, beginning on line 13 of page 8, does express his approval of the incentive mechanism proposed by DPS Staff, he does so only in the context of additional conditions that DPS Staff did not demonstrate or propose in its direct testimony.

While PULP is correct that no specific rule has been adopted as to the substantive contents of proper rebuttal, the term does have common and legal definitions that undermine PULP's position. Commission regulations on pleadings that do exist mostly address the appearance of the document, not the specific substance, leaving such decisions to the presiding ALJ.⁵ Moreover, while the criminal appeals decisions are not controlling in this instance, they are persuasive to the extent they support the legal position urged by the Company and

⁵ Compare 16 NYCRR §§ 3.5 & 4.5(a) to (c) with 16 NYCRR § 3.6 (providing that motions be handled by presiding officers where one has been assigned) and 16 NYCRR § 4.5(f) (providing the presiding officer for a case "all authority customarily exercised by presiding officers").

recognized by the two administrative rulings cited by NFGD that some boundary for permissible rebuttal exists.

Additionally, while the Con Edison Ruling is not directly on point, it is consistent with the concept of presenting to the Commission a clear and concise record of the issues incorporating as clean an evidentiary record as can be maintained. This same interest responds to PULP's arguments that the Company has shown no prejudice or harm. While that type of showing can factor into a decision on allowing improper testimony in the record, excusing its impropriety in favor of inclusion, it is not a required showing once the impropriety of testimony has been demonstrated. Having established that rebuttal has a commonly accepted legal definition, I share the ALJs' concern on page 9 of the Con Edison Ruling that a longer term effect of keeping the PULP testimony in the evidentiary record in this case is that it invites parties to repeat the behavior in future cases.

As to PULP's concern with an inflated rate case expense, any party, including utilities that appear before the Commission, may properly seek to exercise their procedural rights irrespective of how the legal costs get recovered. It is clear that NFGD's motion is not frivolous and it is, therefore, properly submitted as an exercise of professional judgment.

Finally, PULP's argument that Mr. Yates' expert testimony may serve to contribute to the record does not respond to the fact that it was not proper rebuttal. The evidentiary record is separate from the case record as a whole. The positions expressed in Mr. Yates' rebuttal may quite properly be expressed by PULP elsewhere to serve a similar purpose in a more proper manner. Moreover, the testimony to which Mr. Yates offers his observations was offered by other parties' expert witnesses. Mr. Yates' status as an additional expert does not

change the fact that much of the testimony subject to NFGD's motion does not, by definition, actually rebut any point previously made by those other parties.

In the interests of a clean evidentiary record at the hearings in this matter, PULP should prepare a new document that eliminates the specific testimony stricken by this ruling and provide it by email to all parties prior to the start of evidentiary hearings in this case. Such rebuttal testimony should strike the testimony appearing after the first three words of line 7, page 1, through and including the first three words of line 9, page 2 (beginning with "focuses on ..." and ending at "Finally, my testimony,"). Then, the conforming rebuttal testimony should further strike the entirety of pages 3, 4, 5 and 6. The rest of the existing pre-filed document, beginning on page 7 at line 1 and ending on page 10, line 2 are not to be stricken and should not be altered in any manner other than to change the page and line numbers so that gaps created by the strikes are filled.

PULP need not submit a "redlined" document showing the alterations made due to the strikes, only the "clean" copy. The original copy of the PULP rebuttal will remain on the Department of Public Service Document Matter Management system (DMM) for purposes of reference and in the interests of a full public record, but the evidentiary record at hearing will include only the rebuttal created by PULP to conform to this Ruling.

(SIGNED)

DAKIN D. LECAKES