

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission as to  
the Rates, Charges, Rules and Regulations of  
KeySpan Gas East Corporation for Gas Service

Case 16-G-0058

Proceeding on Motion of the Commission as to  
the Rates, Charges, Rules and Regulations of  
The Brooklyn Union Gas Company for Gas  
Service

Case 16-G-0059

**STATEMENT OF THE  
UTILITY INTERVENTION UNIT ON THE  
JOINT PROPOSAL**

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NEW YORK STATE DEPARTMENT OF STATE  
DIVISION OF CONSUMER PROTECTION  
ONE COMMERCE PLAZA  
ALBANY, NEW YORK 12231-0001

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**INTRODUCTION**

The Utility Intervention Unit (“UIU”) of the New York State Department of State’s Division of Consumer Protection submits these comments on the Joint Proposal (“JP”) filed on September 7, 2016 in the above-captioned matters. The JP was executed by KeySpan Gas East Corporation dba National Grid (“KEDLI”), the Brooklyn Union Gas Company d/b/a National Grid NY (“KEDNY”) (together, “Companies”), Department of Public Service Staff (“Staff”), City of New York (“CNY”), Environmental Defense Fund (“EDF”), BBPC, LLC d/b/a Great Eastern Energy (“GEE”), Direct Energy Services, LLC (“Direct”), Consumer Power Advocates (“CPA”), Estates NY Real Estate Services LLC (“Estates”), and Spring Creek Towers (collectively, “Signatory Parties”). Utility Rate Analysis Consultants (“URAC”) and the Public Utility Law Project of New York (“PULP”) oppose the JP.

UIU neither supports nor opposes this JP. UIU nevertheless submits these comments to highlight to the Public Service Commission (“Commission”) its concerns regarding Site Investigation and Remediation (“SIR”) expenses. The Companies already pass significant SIR

expenses onto ratepayers, and as these expenses are likely to increase precipitously in the future, the burden on ratepayers may become too onerous without appropriate cost-sharing measures.

## DISCUSSION

Determining the appropriate recovery mechanism for SIR costs presents unique regulatory challenges. As the Commission has recognized, SIR costs represent an “intergenerational equity problem,” wherein today’s ratepayers are asked to pay for the environmental remediation of unusable plants that have not provided any customer benefits for generations.<sup>1</sup> Concerned about the high SIR costs imposed on captive ratepayers, the Commission instituted a generic proceeding in 2011 in part to analyze the distribution of SIR costs between ratepayers and shareholders.<sup>2</sup> The Commission ultimately declined to adopt a generic policy, in part citing concern for potential negative effects on utility credit ratings,<sup>3</sup> but did “retain unfettered discretion to require sharing when appropriate.”<sup>4</sup> The Commission identified earning sharing mechanisms, commonly developed during rate case negotiations, as an example of where SIR cost sharing between ratepayers and shareholders may be appropriate (and, indeed, expected).<sup>5</sup> Where a utility earns a rate of return greater than that which the Commission determined to be reasonable, it should also be able to absorb some SIR costs

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<sup>1</sup> Case 11-M-0034, *Proceeding on Motion of the Commission to Commence a Review and Evaluation of the Treatment of the State’s Regulated Utilities’ Site Investigation and Remediation (SIR) Costs*, Order Concerning Costs for Site Investigation and Remediation (issued and effective November 28, 2012) (“SIR Order”) at 12 (“Instituting this proceeding, we voiced concerns about the equity of the policy of burdening ratepayers with the entirety of these expenses, under the unusual circumstance that the expenses at issue were incurred to remediate pollution deposited at facilities in operation generations ago. The customers who are paying for the remediation are not those who benefited from the plants themselves, creating what the Recommended Decision referred to as an “intergenerational equity problem.”)

<sup>2</sup> Case 11-M-0034, Order Instituting Proceeding (issued and effective February 18, 2011) at 1-2 (“We stated our interest in examining on a statewide or “generic” basis the funding mechanisms used to support utility SIR expenditures and stated our uncertainty regarding the question of whether ratepayers should bear sole responsibility for the approximately \$2 billion in costs still expected to be incurred in remediation efforts. This uncertainty grows out of the complex history of these costs, as well as the impact such recovery may have on incentives to effectively control expenses for the clean-up.”)

<sup>3</sup> SIR Order at 17-18. (“We recognize, as MI and DOS urged, that the utilities did not establish to a certainty that negative credit action would follow our adoption of generic sharing of SIR costs. However, both Staff and the utilities adduced evidence of how seriously rating agencies take a generic policy change and how closely policies regarding recovery of environmental costs are monitored.”)

<sup>4</sup> *See id.* at 12.

<sup>5</sup> In the SIR Order, Commission noted an expectation that Staff and other parties aggressively explore opportunities “to allocate some portion of excess earnings to pay down deferred SIR costs” during negotiations for rate plans contemplating an earnings sharing mechanism. *Id.*

without endangering its credit rating. The Commission has since approved several utility joint proposals with ratepayer-shareholder SIR cost sharing provisions,<sup>6</sup> including a Consolidated Edison joint proposal that allocates a portion of that company's excess earnings to reduce deferred SIR costs.<sup>7</sup>

This JP includes no such cost-sharing of SIR expenses. UIU recognizes that the JP is a package that reflects compromises on a variety of issues, and so declines to oppose the JP on these grounds; however, given the Companies' escalating forecasted SIR costs, estimated in 2015 to total \$743 million,<sup>8</sup> UIU recommends the Commission consider measures to offset ratepayer burden when evaluating future rate plans. In the 2011 SIR proceeding, the Commission noted that KEDLI and KEDNY could have the highest forecasted SIR expenses in the state.<sup>9</sup> The Commission's 2012 SIR Order adopted several measures designed to improve SIR cost monitoring,<sup>10</sup> which according to Staff, the Companies have generally complied with.<sup>11</sup> However, under the JP, the Company's ratepayers are still asked to bear 100% of a significant SIR cost burden over the three-year rate plan.<sup>12</sup> Three years of SIR expenses are expected to cost \$204 million, but may grow; KEDNY has authorization to impose an SIR surcharge of up to 2%

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<sup>6</sup> See, e.g., Cases 09-E-0715 *et al.*, *New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation – Rates*, Order Establishing Rate Plan, 14 (issued September 21, 2010) (explaining that one-half of the Company's 15% share of an 85/15 of excess earnings band will be used to write down deferred debits including environmental remediation costs); see also Cases 09-E-0588, *et al.*, *Central Hudson Gas & Electric Corporation – Rates*, Order Establishing Rate Plan (issued June 18, 2010), Appendix A, p. 16 (explaining that if Company earnings exceed 11.5%, half of the 10% allocated to shareholders will be deferred for the future benefit of ratepayers, in part to reduce the deferred SIR expenses).

<sup>7</sup> Cases 13-E-0030 *et al.*, Order Approving Electric, Gas and Steam Rate Plans in Accord with Joint Proposal 26-27 (February 21, 2014) (“We find the modifications to past earnings sharing mechanisms, particularly the use of shared earnings to write down deferred SIR costs, responsive to the expectations we expressed in our November 2012 SIR Order.”)

<sup>8</sup> The Companies' 2015 annual reports on SIR issues provided a \$743 million forecast for future SIR expenses. See *infra* note 14.

<sup>9</sup> SIR Order at 8 (“These estimates of SIR costs from 2012 on yield a portrait of increasing but still moderate bill impacts for most utilities, decreasing bill impacts for others, and relatively high impacts for KEDNY and KEDLI.”)

<sup>10</sup> *Id.* at 30 (“First, utilities are required to file annual reports of SIR costs, pursuant to uniform annual SIR reporting requirements to be detailed by Staff and the utilities. The annual filings will include reporting on the timeliness of remediation and forecasts for future spending. Second, utilities will formalize and file an inventory of best practices for SIR cost containment, based on the efforts to date of the utility group. Third, we adopt uniform rate case filing requirements regarding SIR costs, to monitor compliance with timetables and cost control practices.”)

<sup>11</sup> See Cases 16-G-0058 & 16-G-0059, Prepared Testimony of Site Investigation and Remediation Panel 26 (filed May 20, 2016) (“We believe the Companies have generally and sufficiently satisfied the information filing requirements established in the SIR Order.”)

<sup>12</sup> KEDNY's forecasted SIR costs are \$164.813 million over three years. See JP at 32. KEDLI's forecast SIR costs over this time period are \$39.66 million. See JP at 82.

of the prior year's aggregate revenues following Rate Year 2.<sup>13</sup> These costs represent only a fraction of the Companies' total estimated SIR costs of \$743 million,<sup>14</sup> so SIR expenses will increase in significance as cost drivers in future rate plans.

These high and escalating SIR costs signal a need to explore strategies for decreasing the burden on ratepayers. This may include directing the Companies to develop further strategies to lower SIR liabilities or to propose cost-sharing mechanisms in their next rate cases, for example, by adjusting the earnings sharing mechanism to allocate excess earnings toward writing down deferred SIR expenses.<sup>15</sup> The Commission should consider that ratepayers are captive customers forced to pay for utility service, whereas shareholders are volunteers who choose to invest in a regulated utility company, and have the opportunity to understand the associated financial risks. Where, as under this JP, the utilities would receive a return on equity significantly above the level required to maintain their credit ratings,<sup>16</sup> a shareholder-ratepayer cost sharing mechanism should not endanger the Company's credit profile.

The Commission has broad authority to ensure utility rates are just and reasonable.<sup>17</sup> Courts have recognized rates that reflect "a just and reasonable balancing of consumer and investor interest" satisfy the constitutional and decisional mandates imposed on the Commission by the legislature.<sup>18</sup> In future KEDNY and KEDLI rate plans, and perhaps also in this rate plan,

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<sup>13</sup> See JP at 32-33 (noting that beginning in Rate Year 2, KEDNY may impose a SIR surcharge to cover "(i) the difference between actual SIR expense in the prior Rate Year and the Forecast Rate Allowance in the prior Rate Year and (ii) any amount that was not recovered in the prior Rate Year's SIR Recovery Surcharge because the cumulative difference between actual SIR costs and the Forecast Rate Allowance did not exceed the \$25 million threshold and/or the amount would have increased KEDNY's aggregate revenues by more than two percent.")

<sup>14</sup> KEDNY estimates an additional \$660 million, beyond the \$392 million that has already been incurred, will be necessary to complete the Company SIR program. Case 11-M-0034, Annual Report Concerning the Status of Site Investigation and Remediation Costs, Schedules and Regulatory Compliance for the Brooklyn Union Gas Company d/b/a National Grid NY 3 (March 31, 2016); KEDLI estimates an additional \$83 million, beyond the \$431 million which has already been incurred, will be necessary to complete the Company SIR program. Case 11-M-0034, Annual Report Concerning the Status of Site Investigation and Remediation Costs, Schedules and Regulatory Compliance for the KeySpan Gas East Corporation d/b/a National Grid 3 (March 31, 2016).

<sup>15</sup> See *supra* note 7.

<sup>16</sup> The JP provides the Companies with a return on equity (ROE) of 9.0%, JP at 7 (KEDNY) and 61 (KEDLI), whereas Staff testified that an ROE of 8.6% is appropriate. Cases 16-G-0058 and 16-G-0059, Initial Testimony of Abdul Qadir 5 (filed May 20, 2016).

<sup>17</sup> *Niagara Mohawk Power Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 69 N.Y.2d 365, 369, 507 N.E.2d 287, 289 (1987) ("Indeed, it has been recognized that when it comes to setting rates for such service the Commission has been granted "the very broadest of powers", the Legislature mandating only that the rates fixed be "just and reasonable") (citations omitted).

<sup>18</sup> See *id.*

a shareholder contribution toward deferred SIR costs may represent a reasonable balancing of consumer and investor interests.

**CONCLUSION**

While UIU neither supports nor formally opposes this JP, UIU remains very concerned with the high SIR costs to be borne by KEDLI and KEDNY customers. UIU recommends that the Commission consider tools, such as adjustments to earnings sharing mechanisms, to help reduce the heavy ratepayer burden of SIR costs in future rate plans.

Respectfully submitted,

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