

**Before the Public Service Commission
of the State of New York**

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 No. 16-G-0257

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

National Fuel Gas Distribution Corporation (“Distribution” or “the Company”) submits this Motion to Strike Portions of Pre-Filed Rebuttal Testimony of William D. Yates, CPA for Public Utility Law Project (“PULP”) because they are outside the permissible scope of rebuttal testimony and merely repeat and endorse testimony already in the record. The portions of Mr. Yates’ testimony that the Company seeks to preclude are at the following page and line ranges: 1:10–2:8, 3:1–7:11 and 8:13–9:19 (the “Challenged Testimony”). The Challenged Testimony introduces no new facts or arguments, and it does not contradict any facts that were set forth by the parties in their pre-filed direct testimony. Therefore, the Challenged Testimony should be stricken from the record.

I. INTRODUCTION AND BACKGROUND

On June 24, 2016 Your Honor issued a Ruling on Schedule that set forth a deadline of August 26, 2016 for Department of Public Service Staff (“Staff”) and intervenor testimony. The Ruling set a deadline of September 16, 2016 for rebuttal testimony, and set October 5, 2016 for the commencement of an evidentiary hearing. Accordingly, on August 26th several parties, including Staff and the Utility Intervention Unit (“UIU”) submitted pre-filed direct testimony.

On September 16, 2016, William D. Yates, on behalf of PULP, submitted purported “rebuttal” testimony (“PULP September 16 Testimony”) primarily for the purpose of expressing satisfaction with the pre-filed direct testimony of Staff and UIU, except for the portion of the testimony discussing Staff’s proposed performance incentive mechanism.¹

At the outset, the PULP September 16 Testimony states, “My rebuttal testimony focuses on five sets of issues raised by one or more of the respective direct testimonies of the [UIU] and [Staff].”² However, for four out of the five issues identified, Mr. Yates fails to introduce any facts that rebut any portion of the pre-filed direct testimony referenced therein. Instead, the Challenged Testimony merely quotes large portions of the pre-filed direct testimony of Staff and UIU, and expresses approval. Specifically, Mr. Yates made the following statements, which show that the purpose of the Challenged Testimony is to bolster existing arguments, not to rebut previously filed facts or testimony: (1) “PULP agrees with DPS Staff and UIU that the Company’s basic service charge should not be increased;”³ (2) “I support Staff and UIU’s rejection of the Company’s proposal to discontinue its Customer Service Performance Incentive (CPSI) Mechanisms;”⁴ (3) “I explain my support for the recommendations of the UIU’s witness Gregg Collar regarding the Company’s low income programs;”⁵ and (4) “My testimony explains my support for Staff’s Policy Panel’s recommendation that the Commission direct the company to install residential methane detectors, when the new detectors are commercially available, in low income customers’ homes.”⁶ No exhibits were offered in connection with this testimony.⁷

¹ PULP September 16 Testimony, 7:12 - 8:11.

² Id. at 1:7-9.

³ Id. at 1:12-13.

⁴ Id. at 1:15-16.

⁵ Id. at 1:18-19.

⁶ Id. at 2:6-8.

⁷ Id. at 2:17-19.

II. ARGUMENT

The Challenged Testimony Does Not Qualify as Proper Rebuttal Testimony

The Challenged Testimony is clearly not proper rebuttal. The New York State Court of Appeals has set forth clear rules governing the admissible scope of rebuttal testimony. In People v. Jean S. Harris, 57 N.Y.2d 335 (1982), the Court held:

The rules concerning the proper scope of rebuttal evidence are clear. The party holding the affirmative of an issue must present all evidence concerning it before he closes his case. Thereafter, that party may introduce evidence in rebuttal only. ‘Rebutting evidence in such cases means, not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove.’

Harris, 57 N.Y.2d, at 345 (quoting Marshall v. Davies, 78 N.Y. 414, 420).⁸ Later, in People v. Darrell K. Harris, 98 N.Y.2d 452 (2002), the Court of Appeals explained the purpose behind limiting the permissible scope of rebuttal evidence, holding, “The limitation on rebuttal evidence is to avoid first, the possible unfairness to an opponent who has justly supposed that the case in chief was the entire case which he had to meet, and second, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning.” Id. at 489 (internal citations omitted).

As noted in Section I above, the Challenged Testimony does not provide any evidence in denial of an affirmative fact contained in the pre-filed direct testimony of the parties. Instead, the Challenged Testimony merely repeats and corroborates testimony that was already in the record.

⁸ See also 5 N.Y. Prac., *Evidence in New York State and Federal Courts*, § 6:68 (“Rebuttal generally is restricted to evidence that refutes new matters raised during the defense and impeaches the credibility of the defendant’s witnesses. Generally the plaintiff/prosecutor may not, during rebuttal, present evidence that merely reinforces her case in chief.”).

The Commission also has repeatedly adopted a position that is in line with the Court of Appeals' view on precluding testimony that falls outside of the proper scope of rebuttal. For example, in 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*, the Administrative Law Judges ruled that information that was introduced for the first time in rebuttal testimony "is not rebuttal. It is, in fact, supplemental direct testimony filed 143 days after it was due."⁹ Similarly, here, the Challenged Testimony is not rebuttal. It is simply late filed, supplemental arguments with the label of rebuttal testimony. As such, it should not be permitted on the record.

In 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*, a motion to strike testimony was granted where the applicant and Staff argued, among other things, that the testimony was merely a summary of previously filed testimony and simply reiterated what was already on the record.¹⁰ Here, the Challenged Testimony is also a mere summary of the pre-filed direct testimony of Staff and UIU and a reiteration of positions that are already on the record.

Conclusion

The Challenged Testimony is not proper rebuttal testimony because it merely repeats and reiterates pre-filed direct testimony that is already in the record. The Challenged Testimony does not attempt to rebut any fact or impeach any witness. Instead, it merely summarizes, quotes, and corroborates arguments made in the pre-filed direct testimony of other witnesses. For these

⁹ Cases 08-E-0539 and 08-M-0618, Ruling on Motion to Strike, p. 8 (issued Nov. 4, 2008).

¹⁰ See Case 10-T-0139, Ruling on Motions to Strike, pp.1-2 (issued June 22, 2012).

reasons, the Company respectfully requests that Your Honor strike the Challenged Testimony from the record.

Respectfully Submitted,



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Albany, New York