

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Case 16-G-0058 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of KeySpan Gas East Corporation d/b/a National Grid for Gas Service

Case 16-G-0059 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of The Brooklyn Union Gas Company d/b/a National Grid NY for Gas Service

Case 14-G-0091 – In the Matter of the Acts and Practices of The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid Regarding Billing of Each Company’s SC No. 2 Customers from March 2008 to March 2014

Case 14-G-0503 – Petition for Approval, Pursuant to Public Service Law, Section 113(2), of a Proposed Allocation of Certain Tax Refunds Between KeySpan Gas East Corporation d/b/a National Grid and Ratepayers

Case 13-G-0498 – Petition for Approval, Pursuant to Public Service Law, Section 113(2), of a Proposed Allocation of Certain Tax Refunds Between KeySpan Gas East Corporation d/b/a National Grid and Ratepayers

Case 12-G-0544 – In the Matter of the Commission’s Examination of The Brooklyn Union Gas Company d/b/a National Grid NY’s Earnings Computation Provisions and Other Continuing Elements of the Applicable Rate Plan

Case 11-G-0601 – Petition for Approval, Pursuant to Public Service Law, Section 113(2), of a Proposed Allocation of Certain Tax Refunds Between KeySpan Gas East Corporation d/b/a National Grid and Ratepayers

**PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.
INITIAL STATEMENT OPPOSING ELEMENTS OF THE JOINT PROPOSAL**

Dated: September 16, 2016

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I. INTRODUCTION

On January 29, 2016, the Brooklyn Union Gas Company d/b/a National Grid NY (“KEDNY”) and KeySpan Gas East Corporation d/b/a National Grid (“KEDLI”) (collectively, the “Companies”) filed tariff leaves and supporting testimony and exhibits for new rates and charges for gas service to be effective January 1, 2017. As filed, ratepayers’ bills would have increased by approximately \$321 million and \$191 million for KEDNY and KEDLI, respectively. That estimated impact on bills was presumptively low, however, because it could not contain the entire SIR costs for the Companies’ two largest cleanup sites, due to the uncertainty of the Companies’ obligations pertaining to the investigation and remediation of the Gowanus Canal and Newtown Creek Superfund sites.

Settlement discussions commenced on May 31, 2016. On September 8, 2016, the Companies filed a Joint Proposal (“JP”) memorializing the rate case settlement agreement among the Companies, Department of Public Service Staff (“DPS Staff”), the City of New York, Environmental Defense Fund, BBPC, LLC d/b/a Great Eastern Energy, Direct Energy Services, LLC, Consumer Power Advocates, Estates NY Real Estate Services LLC, and Spring Creek Towers with respect to the above-captioned matters. Per the *Notice of Procedural Conference* issued August 29, 2016 and the *Ruling on Schedule for Consideration of Joint Proposal* issued on September 13, 2016, parties were directed to file statements in support or opposition to the JP by September 16, 2016.

The JP’s KEDNY revenue requirement increases are \$272.1 million in Rate Year One, \$41.0 million in Rate Year Two and \$48.9 million in Rate Year Three. For KEDLI, the comparative increases are \$112.0 million, \$19.6 million and 27.0 million. Approximately \$9.6 million of the \$49 million difference between the KEDNY Rate Year One revenue increase is due to the difference between the Companies’ requested return on equity of 9.94% and the JP’s unsupported “compromise” position of 9.0%; for KEDLI, the comparison is approximately \$7.6 million of the \$79 million.¹

The proposed rate increases do not include all of the potential bill impacts of expenses associated with many of the Companies’ Superfund investigation and remediation (“SIR”) responsibilities. Significantly, the proposed rate increases despite being historically large, do not

¹ Neither the Companies’ nor the JP’s return on equity conform with the Commission’s Generic Financing Methodology, as will be discussed further below.

include any of the potentially large costs associated with the investigation and remediation of the Gowanus Canal and Newtown Creek Superfund sites. These proposed bill hikes, and the additional bill impacts from Gowanus and Newtown, could not come at a worse time for utility consumers in the Companies' service territories: Data show that almost half of KEDNY's customer cannot afford their utility bills;² this is also the case for a large number of KEDLI's customers.³ Indeed, the JP's failure to approach recovery of SIR costs with thoughtful innovation in the style of REV's market-orientation is startling, especially given that Staff followed the REV approach in recommending positive and negative incentives regarding terminations and arrears.

II. SUMMARY OF PULP'S OPPOSITION TO THE JOINT PROPOSAL

The Public Utility Law Project of New York, Inc. ("Project" or "PULP") welcomes the opportunity to submit this statement opposing the JP filed in this case. The JP is contrary to the public interest because the totality of its excessive revenue requirements, incentives, surcharges, and rate designs will result in unjust and unreasonable rates and therefore violates Public Service Law Section 65(1). The JP is also contrary to public interest because the settling parties have elected to allocate all of the Site Investigation and Remediation ("SIR") costs to ratepayers, including the unknown and potentially overwhelming costs of the Superfund sites at Gowanus Canal and Newtown Creek and have failed to impose market-based positive and negative incentives to contain the Companies' burgeoning SIR expenses. The JP is also arguably in conflict with the State's affordability policy⁴ because the rate design features are inefficient and exacerbate the affordability crisis facing the Companies' residential customers.⁵ Finally, the account termination and uncollectible billing incentive is structurally flawed and would reward the Companies for implementing ideas and techniques that another utility has already successfully deployed⁶ but would not penalize the Companies if the number of terminations and

² Case 16-G-0059, *supra*, Testimony of William D. Yates (dated May 20, 2016), page 6, 10-26.

³ Case 16-G-0058, *supra*, Testimony of William D. Yates (dated May 20, 2016), pages 6, 10-23.

⁴ Case 14-M-0565, *Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility Customers*, Order Adopting Low Income Program Modifications and Directing Utility Filings (issued May 20, 2016).

⁵ *Id.* at 8 ("It is further reasonable to expect that utility costs should not exceed 20% of shelter costs, leading to the conclusion that an affordable energy burden should be at or below 6% of household income (20% x 30% = 6%).")

⁶ Cases 14-E-0318 & 14-G-0319, *Central Hudson Gas & Electric Corporation-Rates*, Report on Service Terminations Reduction Efforts (Rate Year Ended June 30, 2016), filed August 15, 2016.

the amount of uncollectible charges increase. For the foregoing reasons therefore, we urge the Administrative Law Judge ("ALJ") not to recommend approval of the JP, or alternatively, to condition approval upon certain modifications, as further explained in Section X below.

III. THE JP FAILS TO SATISFY THE COMMISSION'S STANDARD OF REVIEW

The Public Service Commission has the statutory obligation to review, and approve (with or without modification), or reject all settlement agreements brought to it by the proponents of the settlement. The Commission's Settlement Guidelines, which provide the parameters within which such an approval or disapproval must be analyzed, states that the terms and conditions of a joint proposal must be just and reasonable and in the public interest.⁷ In considering the public interest, the Commission balances the proposal's effect on ratepayers, investors, and the long-term viability of the utility company.⁸ When seeking a rate increase, utility companies bear the burden of proving that the changes are just and reasonable.⁹ No rate shall be presumed to be just and reasonable.¹⁰ Any change must be supported by competent testimony.¹¹

While the Commission can be deferential to settlements agreed upon by normally adversarial parties, that deference is not without limits. Nor is that deference without rational boundaries. In addition to compliance with proper procedures, determining whether the terms of a joint proposal are in the public interest involves substantive consideration of the following:

1. Consistency with the law and regulatory, economic, social and environmental State and Commission policies;
2. Whether the terms of the joint proposal compare favorably with the likely result of a fully litigated case and produces a result within the range of reasonable outcomes;

⁷ Cases 90-M-0225 and 92-M-0138, *Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines*, Opinion No. 92-2 (issued March 24, 1992), at 30.

⁸ *Id.*, Appendix B, *Procedural Guidelines for Settlement (1992)*, F(1)(a), Standards of Review, pg. 8.

⁹ 16 NYCRR Section 61.1.

¹⁰ *Id.* at § 61.2.

¹¹ *Id.* at §61.3(3)(b).

3. Whether the joint proposal fairly balances the interests of ratepayers, investors and the long-term soundness of the utility; and,
4. Whether the joint proposal provides a rational basis for the Commission's decision.¹²

It is important to remember that neither the “balancing of interests” exercise nor the “rational basis” review in any way diminishes the burden of proof obligation¹³ of the “proponents of a proposed settlement to place into the record the details of the agreement, and a statement or testimony in support, which should contain its underlying rationale and how the settlement of issues compares both to its litigating position and what it regards as the likely outcome of litigation.”¹⁴ To the extent that the parties supporting the JP do not provide its rationale with a comparison of its litigating position and what it regards as the likely outcome of litigation, then, the ALJ must reject such statements of support as insufficient and the issues raised by PULP herein must be properly addressed at the evidentiary hearing.

IV. BACKGROUND: The Impact of Incalculable SIR Charges and Surcharges, Vastly Increasing Rates and Unreasonably Generous “Earnings Sharing Mechanisms” Upon the Affordability Crisis

As the Supreme Court clarified in the *Hope* case, “The ratemaking process under the Act, *i.e.*, the fixing of “just and reasonable” rates, involves a balancing of the investor and the consumer interests.” *Fed. Power Com. v Hope Natural Gas Co.*, 320 US 591, 603 [1944]. The *Hope* analysis is referred to as the “end result” test, which is often cited for the rule that a regulator can choose between different methods to reach a just and reasonable result, and that the “end result” is what matters, not the method used.¹⁵ But the “end result” test does not excuse the

¹² Case 90-M-0255 and 92-M-0138, Settlement Procedures, pg. 30.

¹³ The burden of proof comprises the burden of production and the burden of persuasion. People often merge the two concepts of burden of proof together. The law contemplates no presumption of reasonableness just because parties agreed to something.

¹⁴ Cases 90-M-0225 and 92-M-0138, *Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines*, Opinion No. 92-2 (issued March 24, 1992), Section E, Responsibilities of Party to Develop the Record, pg. 6.

¹⁵ See, *New York v Pub. Serv. Comm'n*, 17 AD2d 581, 584 [3rd Dept 1963] (“We look then to see, not whether the commission has made a determination wholly free from error in the process, or quite in accord with a judicial view of how the procedure before the commission should be managed in detail, but to the “total effect” of the rate order in relation to what is just and reasonable.”)

agency from the duty to explain its methods or apply them consistently when approving settlement agreements that fix rates of utility customers.

In the case at hand, the investor's interests and consumers' interests are not balanced, as is discussed at length below. Instead, each of the key factors argued in this brief greatly favor the investors' interests, and thus the rates arrived at by the JP cannot be said to be just and reasonable, because there is no practical attempt to consider consumers' interests fairly. For example, the allocation of all of the SIR costs to the ratepayers places a massive burden upon their bills – approaching \$800 million, and a potential surcharge of up to 2% per year. This completely asynchronous burden placed upon ratepayers is inconsistent with Commission policy as noted in generic 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 November 28, 2012) (“SIR Order”). The proposed asynchronous allocation of the SIR costs is also inconsistent with Commission policy as shown in the Order in Con Edison's 2013 rate case, where Con Edison and DPS Staff agreed to a formula subsequently ordered by the Commission that allocated 50% of Con Edison's earnings sharing toward paying for SIR costs.¹⁶ Finally, this misallocation of the burden of the SIR costs also sends a perverse market signal to utilities that disincentivizes them from making prudent investment choices to avoid potential superfund sites, such as when buying an existing utility with significant toxic sites, as was the case when National Grid purchased KeySpan (f/k/a Brooklyn Union Gas).

Turning to the JP's ROE, DPS Staff's original proposal for a traditional one-year rate case derived from the Commission's standard generic model for calculating the reasonable return on equity, and was 8.6%. The Company's initial proposal was 9.94%. The compromise ROE proposed in the JP is 9.0%. This departure from both sides' initial proposals is unsupported by any expert testimony or other evidence in the record. Additionally, the end result of the proposed rate design and ROE is to effect, by Rate Year 3, a 40% increase in delivery rates for the typical residential heating customer with monthly usage of 80 Therms. (JP, Appendix 3, Schedules 4-5)

¹⁶ Cases 13-E-0030 - *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*; and 13-G-0031 - *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Gas Service; Order Approving Electric, Gas and Steam Rate Plans in Accord with Joint Proposal*, issued February 21, 2014), at p. 26.

This is completely unbalanced in favor of the Companies' interests, as opposed to balancing the Companies' and ratepayers' interests as the *Hope* test requires.

Similarly, the JP's proposed earnings sharing mechanisms ("ESM") unreasonably favor the Companies' interests as opposed to balancing them against the interests of the consumers. The proposed ESMs take effect at 9.5%, which leaves a 0.5% dead band in which the Companies may keep all overearnings. This dead band is simply included in the JP without testimony or other evidence in the record supporting why the Companies should receive a more favorable ESM in this rate case than in a previous Niagara Mohawk case discussed below, where there was no dead band. The absence of fiscal or policy reasons for such a concession by DPS Staff is demonstrative that the settlement process has become a forum for negotiation of positions that produce end results devoid of a rational basis other than the obvious fact that there was a compromise among settlement parties to agree to the end result.

Taken together, the totality of the impact of these three significant failures to appropriately balance the Companies' interests against the consumers' interest, compels the conclusion that the resulting rates would not be just and reasonable. An additional factor that militates toward such a finding is the crisis of affordability in the Companies' service territories. In the KEDNY service territory as of December of 2015, more than 16% of the Companies' customers were 60 days or greater in arrears.¹⁷ During 2015, more than 800,000 final termination notices were sent to the Companies' customers, a number that was roughly double to that of approximately a decade earlier.¹⁸ Median household income has failed to keep pace with median household costs in recent years, causing increases to the number of households experiencing energy burdens. This, in turn, has caused residential customer service debt to increase from \$31.6 million dollars in 2003 (\$195 per customer) to \$68.6 million dollars in 2015 (\$445 per customer). Despite this troubling trend, the number of Deferred Payment Agreements (DPAs) entered into by customers has decreased in recent years further indicating that the number of customers in affordable payment agreements has decreased and overall debt increased. These indicia of unaffordability provide a rational basis for the ALJ and the Commission to avoid a JP that is significantly unbalanced in favor of the Companies', as that fails to draw a "zone of reasonableness in which rates may properly fall...[and one that is] bounded at one end

¹⁷ Testimony of William D. Yates, CPA, May 20, 2016, at p. 10.

¹⁸ *Id.* at p. 11.

by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates."¹⁹

V. THE JP'S FULL RECONCILIATION OF SIR COSTS WILL RESULT IN EXCESSIVE BILL IMPACTS AND PRESUMPTIVELY UNREASONABLE RATES.

Under the terms of the JP, the Companies will fully reconcile their SIR expenses (inclusive of Gowanus Canal and Newtown Creek costs) to the Forecast Rate Allowance²⁰. (JP, Section IV, 6.1.4 & Section V, 6.1.4). Any under or over expenditures will be deferred for future refund to or recovery from customers (with the exception of the Citizens site²¹). *Id.* Additionally, beginning in Rate Year Two in KEDNY, to the extent that the difference between actual SIR expenses (again, inclusive of Gowanus Canal and Newtown Creek which have not yet been forecasted) and the Forecast Rate Allowance exceeds \$25 million on a cumulative basis, the JP allows KEDNY to utilize a SIR Recovery Surcharge to allow the Company to recover a surcharge amount no greater than two percent of the Companies prior year's aggregate revenues.²² And, the JP protects KEDLI in the event the Company incurs unanticipated expenses relating to SIR costs incremental to the forecast rate allowance, by allowing the Company to file a petition requesting that the Commission approve recovery of incremental costs through KEDLI's SIR Recovery Surcharge. (JP, Section V, 6.1.4(b)).

As explained in Yates Direct Testimony, the Commission has endorsed the Company's previous proposals to charge ratepayers for 100 percent of SIR expenses; however, the

¹⁹ *Jersey Cent. Power & Light Co. v Fed. Energy Regulatory Com.*, 258 US App DC 189, 810 F2d 1168, 1210 [1987] citing [Washington Gas Light, 188 F.2d at 15](#).

²⁰ 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. The rate allowance for SIR expense for each Rate Year includes (i) one-tenth of the forecast SIR deferral balance as of December 31, 2016 (\$18.521 million) and (ii) forecast SIR costs (\$53.872 million in Rate Year One, \$45.653 million in Rate Year Two, and \$46.767 million in Rate Year Three) (the "Forecast Rate Allowance"). JP, Section IV, 6.1.4.

²¹ KEDNY will continue to absorb 10 percent of the remaining investigation costs for the Citizens site pursuant to the Stipulation and Agreement Resolving Corporate Structure Issues and Establishing Multi-Year Rate Plan, dated June 25, 1996 in Case 95-G-0671.

²² The SIR Recovery Surcharge will include (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.

Commission has never rejected the concept of allocating a portion of the burden of SIR expenses to shareholders. In fact, the Commission has previously reserved the right to order that shareholders should bear a portion of SIR costs. In 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 November 28, 2012) ("SIR Order"), the Commission indicated that it had the legal authority to require shareholders to bear a portion of SIR costs "under specific company and rate case circumstances." (See pages 3-11 of the Order).

Moreover, there is precedent for providing an incentive for a utility to reduce ratepayers' SIR burden. In Case 10-E-0050, the Commission stated:

We are well aware of the importance of thorough, timely cleanups, both for public health and for the economic vitality of affected communities. We intend that utility efforts should further these twin goals. We are concerned, however, that, in practice, the design and implementation of SIR projects may not cost effectively focus the utility's remediation efforts. The current process may lack an effective deterrent to excessive costs in the design and/or implementation of projects. Where neither the agency overseeing the project, nor the company implementing it, has a tangible incentive to minimize costs, the goal of designing and implementing projects in the most reasonable and cost-effective manner, on behalf of ratepayers, might not be properly represented.

In addition, the historic allocation of responsibility for SIR costs should be reexamined, to find relief for ratepayers and to consider arrangements for equitably sharing the burdens of clean-up. The costs represent a legacy of environmental damage that began in the 1880's and continued into the early 1900's. The damage was not incurred in service of today's customers, who are nonetheless bearing the burden of paying for the remediation. It is not clear to us that today's ratepayers should bear the sole responsibility for all of these costs.

Finally, we are generally aware that ratepayers are exposed to SIR cost recovery in most of the gas or electric utilities in the State, and that this exposure statewide is large, in the range of two billion dollars. This makes this matter one of substantial significance to ratepayers throughout the State.

For these reasons, at this time we will adopt Staff's recommendation of an 80/20 mechanism for sharing SIR costs in excess of the rate year allowance.²³

²³ Case 10-E-0050, *Niagara Mohawk-Electric Rates*, Order Establishing Rates for Electric Service (issued January 24, 2011), pp. 105-06.

PULP firmly believes that the circumstances of this rate case proceeding should compel the Commission to require shareholders to bear a portion of the SIR costs. The fact that the forecasted SIR costs associated with the Gowanus Canal and Newtown Creek sites are not included in the base rate allowance, and yet the terms of the JP to allow the Company to fully reconcile these costs in the Rate Plan is a compelling reason why the Commission should require shareholders to bear a portion of the SIR costs. In response to PULP IR Set 1 on the JP, the parties to the JP assert that Gowanus Canal and Newtown Creek costs cannot be determined at this time “because the level of these costs is difficult to estimate with reasonable certainty at this time given the dynamics of these projects and the number of parties involved.” KEDNY/ KEDLI Req. No. BULI-722. If costs cannot be determined, PULP argues that sharing the burden of these unknown costs with shareholders, instead of requiring them to be borne only by ratepayers, would fairly incentivize the Companies to manage costs.

The fact that KEDNY's SIR Recovery Surcharge is capped at 2% of the Company's prior year aggregate revenues does not necessarily make the mechanism reasonable, or adequately incentive the Company to manage its costs. Instead, it insulates the potential annual implementation of the surcharge from the transparency and accountability of a major rate case, by keeping the increase below 2.5%.

In direct testimony, Staff recommended the SIR Recovery Surcharge should be eliminated in KEDNY because SIR costs are reasonably certain, can be recovered through base rates per traditional practice, and because the costs for Gowanus and Canal are challenging to forecast with accuracy. (Staff SIR Testimony, pg. 11, lines 10-23). Staff also recommended that SIR Recovery Surcharge not be used in KEDLI. (Staff SIR Testimony, pg. 13, lines 3-4). Indeed, the proposed SIR rate allowance and Recovery Surcharge do not even adequately safeguard KEDNY ratepayers from the risk of the build-up of excessive deferrals requiring substantial amortization and incurring significant carrying costs over many years beyond this rate plan. “Deferred Environmental Costs” subject to recovery from ratepayers include 1) costs that have been incurred but not yet recovered from ratepayers (Incurred Expenses), plus 2) estimates of *future* environmental costs (Future Estimates). At December 31, 2015, Deferred Environmental Costs

were \$798 million, comprised of approximately \$223 million of Incurred Expenses and \$575 million of Future Estimates.²⁴

According to the testimony of Company witness Charles F. Willard, Incurred Expenses through December 31, 2015 include approximately \$86 million for Gowanus Canal and Newtown Creek, however, no Future Estimates are presented in his testimony for these two sites²⁵. The KEDNY Revenue Requirements Panel forecasts that the net deferral for Incurred Expenses by December 31st, 2016 will be \$182.7 million (Revenue Requirements Panel, Exhibit __ (RRP-3), Schedule 32, Page 5 of 5), which the JP proposes to be amortized over a ten-year period. (JP at 32). If that's the case, then by the end of rate year three, \$128 million of Incurred Expenses will still be deferred, earning a return born by ratepayers. Additionally, from the bridge period year of 2016 through Rate Year 3 (2019), \$179 million of Future Estimates will be incurred, none which include Gowanus or Newtown, leaving \$396 million of the 2015 reserve to be incurred after 2019. It is reasonable to assume then that, based on the JP's proposed amortization of Incurred Expenses and the Company's forecast of expenditures from 2016-19, at least \$528 million of Deferred Environmental Costs will remain subject to recovery from ratepayers after 2019.

However, Deferred Environmental Costs also have the potential to go much higher than \$528 million by the end of this rate plan. It is, of course, unknown whether any Gowanus Canal or Newtown Creek SIR expenses are included in the \$396 million of Future Estimates after 2019. The EPA's last estimate of the cost to clean-up the Gowanus Canal was \$506 million.²⁶ PULP has not even been able to find a reliable estimate of costs to clean up Newtown Creek. And it is certainly impossible to determine KEDNY's share of these liabilities at this time. Therefore, the possibility exists that Deferred Environmental Costs subject to recovery from ratepayers could be as high, or higher, by 2019 than their \$798 billion balance as the end of 2015.

The JP also allows the Companies to continue to charge to SIR accounting the costs to pursue

²⁴ Schedules for Other Regulatory Assets (schedule page 232) and Operating Reserves (schedule page 19) included in 2015 KEDNY Annual Report to the New York State Public Service Commission, see: <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={3537C4B8-4FF9-47AC-80BC-837D57BD4246}>

²⁵ Testimony of Charles F. Willard, Exhibit __ (CFW-8), Page 1 of 1 and Exhibit __ (CFW-10), Page 1 of 1

²⁶ EPA Finalizes Cleanup Plan for Gowanus Canal Superfund Site in Brooklyn, New York; \$506 Million Cleanup Will Remove Contaminated Sediment and Create Jobs See: <https://yosemite.epa.gov/opa/admpress.nsf/0/B1CF5011D9857EA585257BF6005286D5>

recovery (e.g., attorney, expert, and consultant fees) with no limitation or review process of expenses prior to reconciliation. (JP, Section IV, 6.1.4(b) & Section V, 6.1.4(b)).

Using the JP terms for the rate allowance for SIR expenses plus the operating parameters of the SIR Recovery Surcharge, it is possible to approximate the bill impact of total SIR recovery on an SC 1B residential heating customer with annual usage of 960 therms. The Rate Year 1 allowance for SIR expense is \$53.872 million (JP at 32). The total revenue forecast for Rate Year 1 are \$1,298.271 million. (JP, Appendix 3, Schedule 1, Page 1 of 3). Therefore, the allowance for SIR expense is equal to 4.15% of forecasted total revenue for rate Year 1. If SIR expense were allocated at the same volumetric (per therm) rate across all classes, then it could be estimated that \$53.13 of the total annual bill of \$1,280.16 for an SC 1B residential heating customer with annual usage of 960 therms would be comprised of the allowance for SIR expenses (JP, Appendix 3, Schedule 5.1, Page 2 of 13). Using the same methodology, the bill impact of the SIR allowance on this customer for Rate Year 2 and 3 would be \$43.78 and \$44.04, respectively. However, beginning in Rate Year 2, the SIR Recovery Surcharge could add up to another 2% (\$25.60) to this customer's total bill. In such a circumstance the total bill impact of the rate allowance plus the SIR Recovery Surcharge for an SC 1B residential heating customer with annual usage of 960 therms would be \$69.38 in Rate Year 2 and \$69.64 in Rate Year 3 (JP, Appendix 3, Schedule 1, Pages 2-3). And as discussed above, these total SIR bill impacts could be expected to continue well beyond the current rate plan.

In the absence of shareholders absorbing a small portion of SIR expenses—15%, for instance-- a “moral hazard” trap is created for the Companies because they have no financial incentive to worry about the costs of site remediation when considering site management decisions. Shifting a portion of the SIR costs to the Company would better ensure that responsible financial and environmental decisions are reached.

VI. NO RATIONAL BASIS EXISTS FOR THE JP'S RETURN ON EQUITY

On the issue of rate of return and rate design, the Settlement Procedures state that “[s]ettling parties should be aware, however, that these items will be closely scrutinized to ensure that the settlement as a whole is in the public interest.”²⁷ The JP's revenue requirements

²⁷ Case 90-M-0255 and 92-M-0138, Settlement Procedures, pg. 23.

are based on a return on equity (ROE) of 9.0% for both Companies during the three-year term of the Rate Plan using a capital structure with an equity component equal to 48 percent.

The ROE of 9.0% should be found to be unreasonable, as it exceeds the DPS Staff's proposal derived from the standard model and was made without sufficient factual findings. PULP urges the Commission therefore after rejecting the ROE proposed in the JP to look to the "total effect" of the rate order in relation to what is just and reasonable to determine the appropriate ROE.²⁸ "The essential test of such a review as this is that the determination shall have a reasonable basis which, in a rate case, must be read with the statute to mean that there is reasonable basis for finding the rates in question to be "just and reasonable"."²⁹

PULP previously challenged a proposed ROE as irrational and unsupported by evidence in the Case 13-E-0030, setting the rates for electric, gas and steam service for Consolidated Edison of New York.³⁰ There, the ALJ rejected PULP's arguments on the basis that Staff's expert witness testified that Staff had updated its projected ROE during the settlement discussions to reflect the most recent economic climate and that the proposed ROE figures represented were based on Staff's methodology plus a traditional amount of financial and business risk premium typical of multi-year rate plans.³¹ Staff's proposed ROE for the JP therefore was supported by evidence in the record supplying a rational basis for a decision by the Commission, and justifying the rejection of PULP's argument.

However, the circumstances are different in this case than they were in the 2013 Con Ed Rate Case because Staff has admitted that it did not update its projected ROE since Staff's pre-filed testimony. Staff's expert witness recommended that the ROE estimate be updated during the course of this proceeding to reflect the most recent market data (Qadir, Staff Direct Testimony, pg. 49, lines 11-15); however, Staff has not performed an analysis of the appropriate ROEs for the Companies since the analysis included in Staff's pre-filed testimony. (Staff Response to

²⁸ *Power Comm. v. Hope Gas Co.*, 320 U.S. 591, 602.

²⁹ *New York v Pub. Serv. Comm'n*, 17 AD2d 581, 584 [3rd Dept 1963] citing *Matter of Fink v. Cole*, 1 N Y 2d 48, 53).

³⁰ Cases 13-E-0030, et al., *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric, Gas and Steam Service*, Order Approving Electric, Gas, and Steam Rate Plans in Accordance with Joint Proposal (issued February 21, 2014), p. 47.

³¹ Cases 13-E-0030, et al., *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric, Gas and Steam Service*, Order Approving Electric, Gas, and Steam Rate Plans in Accordance with Joint Proposal (issued February 21, 2014), p. 47.

PULP 1st Set of IRs on the JP (1).³²) Nor has DPS Staff identified in any testimony a reasoned basis for upward revision of the ROE target that would be set if its accepted methodology is followed, or quantified any putative benefits obtained for customers in exchange for rates higher than would exist if the Staff had refused to compromise on its ROE methodology and initial testimony. Even if granting higher ROEs to utilities, above the level that would be established in a litigated case, has occurred more than a few times at the Commission, this does not make that tradition of allowing excessive returns just and reasonable or lawful.

A Third Department case provides binding precedent of the appropriate analysis for determining the reasonableness of rates, and in approving terms of a joint proposal. In *NY Tel Co. v Pub. Serv. Com.*, 64 AD2d 232, 240-241 [3rd Dept 1978]) lv denied 46 NY2d 710 [1979], the petitioner New York Telephone Company raised several substantive issues to challenge the Commission's determination to authorize the annual rate increase and allow ROE lower than what had been recommended in a decision by the assigned Administrative Law Judge. Specific to the rate of return, the issue before the Third Department was whether the Commission's determination that the required rate of return on common equity of 11.5% had a rational basis. The Third Department rejected petitioner's contentions that the Commission "arbitrarily failed to consider all but one of the available approaches determining the rate of return on equity and that one approach which the Commission did consider reached an adopted rate of return on equity unsupported by the record"³³ and held that there was a rational basis for the Commission's finding that the rates in question were just and reasonable. In making its determination, the Third Department rejected petitioner's argument that the Commission had arbitrarily selected one of the available approaches to determine the rate of return on equity on the basis that the "Commission's determination need not be wholly free from error in process," and because rate

³² Staff response to PULP 1st Set of IRs on the JP (1) also indicated that recent analysis presented by DPS Staff in testimony filed August 26, 2016 in Case 16-G-0257, National Fuel Gas Distribution Corporation – Rates recommended a ROE of 8.6%, and DPS Staff filed testimony on September 2, 2016 in Case 16-W-0259, New York American Water – Rates, recommending a ROE of 8.55%. Thus, the ROE that would be allowed if the JP were to be approved is well in excess of recent ROE analysis performed by Staff. Staff's ROE has been approved by the Commission in prior litigated cases. PULP supports the Staff methodology and results.

³³ *NY Tel Co. v Pub. Serv. Com.*, 64 AD2d 232, 239 [3rd Dept 1978].)

of return on equity selected by the Commission (11.5%) fell within the range of expert testimony.³⁴

The Third Department standard, which analyzed the reasonableness of a Commission finding of an ROE upon testimony in the record should be followed here. Since there is no evidence on the record of this proceeding supporting or justifying the proposed figure of a 9.0% ROE, the Commission has no rational basis for upholding that term of the JP, and logically cannot do so. The Companies' pre-filed testimony sought revenue increases based on a ROE of 9.94%. (Companies Direct Testimony, Book 1, pg. 46, line 12). DPS Staff's recommended ROE is 8.6%. (Qadir, Staff Direct Testimony, pg. 18, line 19.) The 9.0% ROE target established between settling parties to the JP is not supported by any expert testimony that 9.0% is a just and reasonable ROE. Instead, the parties of the JP apparently would just have the Commission approve without any expert basis that because the ROE figure numerically falls between 8.6% (Staff's recommended ROE) and 9.94% (Companies' requested ROE) that the ROE proposed in the JP is necessarily reasonable.³⁵ PULP disagrees and asserts that based on the Third Department's ruling, (upholding the Commission's determination as rational because the rate on return on equity selected by the Commission was not just a number that happened to fall within the range of expert testimony provided but was itself supported and discussed by expert testimonies), requires the proposed 9.0% ROE, to be supported by expert testimony, otherwise, there'd be no rational basis for the Commission to approve it.

Even if settling parties assert a basis for its proposed ROE in their papers in support of the JP, the Commission has the independent authority to evaluate the proposed figure, and determine its reasonableness. In such an instance, PULP cautions the Commission that the ROE's reasonableness must not be based on whether the ROE figure itself falls within the range of numbers analyzed in the expert testimony on the record, but rather, should be evaluated on whether the expert testimony on the record could actually support the specific ROE proposed.³⁶

³⁴ *Id.*, at 241. Expert testimony on rate of return ranged from 11.3% to 12.5%. The New York Telephone Company arrived at 12.5%. The Consumer Protection Board arrived at a figure of 11.5%, General Services Administration used 11.5% as the lower end of its range, Staff had arrived at a figure of 11.3%.

³⁵ Indeed, by this same lack of evidence-based reasoning, the parties could have agreed to an ROE of 8.61%, or for that matter one of 9.93%, surely absurd given their respective positions in testimony, but certainly possible under the cloaked rubric that has guided their process in arriving at a 9.0% ROE.

³⁶ "We may only determine whether there is any reasonable support in the record for the action taken; or to put it another way in order to annul the order of the commission on the ground that it was arbitrary we should have to say

In the case at hand, the DPS Staff expert witness explained how Companies' proposed ROE of 9.94% would likely be rejected as unreasonable on the basis that investors "are well aware of the Commission's preference for the formulaic approach to the cost of common equity presented in my analysis... [and because] investors are also aware that recent authorized ROEs are closer to my 8.6% ROE recommendation."³⁷ Staff's expert however did not perform similar analysis since then regarding the ROE 9.0% proposed in the JP, or provide a basis for retreat from his original testimony that 8.6% is the proper ROE based on accepted methodology in litigated cases. Similarly, the Companies attacked the Staff testimony on ROE as being unreasonable, and did not retreat from their original position that the right ROE is 9.94% or testify that a 9.0% return is reasonable. (Company Rebuttal Testimony of Ann Bulkley, pg. 1-2 & pg. 44). The only possible inference from the record is that a "deal" was struck at 9.0% but no party or witness says that is the right ROE based on a defensible methodology. Instead, we have polar opposite viewpoints represented in the filed testimony in this case, and only in the form of a stipulated term in the negotiated JP, do we have a proposed ROE that we are to assume is fair on the basis that settling parties agreed to it. The Commission has the independent duty to set fair and reasonable rates and must do more than just approve JPs on the basis that they "keep the peace".

There are several reasons why it makes sense to have a ROE supported by expert witness testimony on the record. The Commission has been inclined to approve proposed ROEs in a joint proposal that are above Staff's initial recommendations because, some believe, in the context of multi-year rate plans utilities are exposed to added business and financial risk by their "stay out" agreement.³⁸ The Public Service Law, however, does not authorize the Commission to approve ROEs higher than justified by evidence in multi-year cases simply for the sake of avoiding future rate reviews. In addition, as DPS Staff's expert witness pointed out, New York ratemaking includes unique mechanisms, such as a fully forecasted test year, revenue decoupling mechanism, full pass through of commodity costs, true-ups of short term debt, and

as a matter of law [***14] that no substantial reason whatever appears in the record to sustain the order and determination under review" (*Matter of Campo Corp. v Feinberg*, 279 App Div 302, 307, *aff'd* 303 NY 995 at 5 of 6)

³⁷ Qadir, Staff Direct Testimony, pg. 49, lines 5-10.

³⁸ 15-E-0283, 15-G-0284: *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York Electric & Gas Corporation for Electric and Gas Service* and 15-E-0285, 15-G-0286: *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric and Gas Service*, ("2015 NYSEG and RG&E Rate Cases"), Order Approving Electric and Gas Rate Plans in Accord with Joint Proposal (issued June 15, 2016).

reconciliations of uncontrollable costs, that mitigate against financial risk to utilities. (Qadir, Staff Direct Testimony, pg. 17, lines 11-19.) Additionally, since NY electric and gas utilities are not vertically integrated, they are viewed by Moody's as having a lower business risk profile. (*Id.* at lines 19-24.)

Given that all of those unique mechanisms articulated by DPS Staff's expert witness are included in this JP, and the Companies, as non-vertically integrated utilities, have a lower business risk profile in Moody's, the Commission cannot be assured that the 9.0% ROE proposed in the JP fairly balances the interests of ratepayers, investors and the long-term soundness of the utility, without any expert testimony supporting a 9.0% ROE as the correct return for shareholder equity investment. Even the Companies admit that benchmarking ROE against market conditions throughout a rate case proceeding yields the most prudent result.³⁹ Given all the unique mechanisms provided in the JP to mitigate against risk, it is especially important that the Commission not assume, without expert justification that the proposed ROE in the JP arrived at in settlement discussions as a way of compromising competing viewpoints actually has any economic justification. Furthermore, as the DPS Staff expert witness addressed in his testimony, significantly different underlying economic conditions, including a reduction in financing rates and required returns, exist today than compared with those that existed when Companies current ROEs were filed in 2009. (Qadir, Staff Direct Testimony, pg. 47, lines 17-22.)

Rates designed to generate an ROE that is too low or too high are unreasonable, and any unreasonable rate is illegal. As explained above, it is imperative that the Commission not approve a recommended ROE of 9.0% absent expert testimony supporting that the figure is reasonable, in light of the unique mechanisms also included in the JP to mitigate risk, and in the context of the market conditions existing at the time the JP was drafted. Furthermore, any effort to justify an upward departure from the established ROE methodology based on non-cost factors should be justified by testimony of witnesses demonstrating benefits that offset the higher return to shareholders for their investments.

³⁹ Company Rebuttal Testimony of Ann Bulkley, pg. 5, line 15-17.

VII. THE INCENTIVE MECHANISM FOR REDUCTION OF TERMINATIONS IS FLAWED IN CONCEPTION AND DESIGN AND ASSUMES HEFPA COMPLIANCE THAT WOULD NOT NEED TO BE DEMONSTRATED

The JP allows the Companies to earn positive incentives for achieving certain targets for residential service terminations for nonpayment while decreasing, or maintaining, the level of bad debt from residential accounts. (JP, Section IV, 7.8 & Section V, 7.8).⁴⁰ As a threshold matter, PULP continues to believe that positive incentives are not appropriate in the area of termination and arrears, as it has argued previously.⁴¹ Nevertheless, PULP recognizes that incentive mechanisms are entrenched practices stemming from state policy that accords value in incentive mechanisms in the context of ratemaking and affordability. Therefore, for the purpose of arguing against the JP, PULP is accepting solely for the sake of argument, the policy of using incentive mechanisms, and takes issue with the proposed terms in the JP for three specific reasons.

First, to the degree that the purpose of a positive incentive is to encourage innovation and greater focus regarding an issue of concern, another utility has already figured out how to reduce the number of terminations, and thus no incentive is necessary to encourage innovation in this JP. Central Hudson reported its success in implementing robust outbound call campaigns, conducting outreach and education in DSS offices, food pantries and legal services, participating in more community events, improving communication with Spanish-speaking customers, and enhancing its email capabilities.⁴² While there may be a policy rationale for incentivizing innovation, there should be no such incentive for promoting the copying of previously achieved innovation.

Second, PULP urges the Commission not to endorse positive incentives that would allow

⁴⁰ KEDNY will have the ability to earn a positive revenue adjustment of \$1.260 million during each Rate Year if it achieves both a residential termination target equal to or less than 34,638 and also, a bad debt expense target equal to or less than \$12,494,661. If KEDNY achieves only one of the above targets, the Company will earn a positive revenue adjustment of \$0.540 million during each Rate Year, provided the other target is at or below 37,916 for residential terminations, or \$16,119,628 for bad debt expense. KEDLY will have the ability to earn a positive revenue adjustment of \$0.840 million or \$0.360 million during each Rate Year if it achieves certain targets for residential terminations and bad debt expense that will be determined by Staff, KEDLI, and other interested parties and filed in a letter with the Secretary by April 15, 2017. (See JP pages 46 and 97).

⁴¹ Case 14-M-0101, Ratemaking Order, pg. 91-92.

⁴² Cases 14-E-0318 & 14-G-0319, *supra*, Central Hudson Report on Service Termination Reduction Efforts, pages 1-2.

the Companies to earn money for achieving certain targets for reducing terminations of residential customer accounts until it can be certain that the Companies are in compliance with HEFPA before termination on accounts occurs. In Yates' direct testimony, the evidence strongly implied that the Companies' customers had insufficient access to DPAs according to the Companies' Collection Activity Reports ("CARs").⁴³ The CARs showed a steadily declining number of DPAs Made and percentage of customers in arrears covered by DPAs. Since HEFPA requires that all customers in arrears are provided with the opportunity to arrange a DPA with the Companies and requires that no termination occur unless a customer has failed to meet the terms of a written DPA, then the number of DPAs Made should rise and fall in tandem with the percentage of customers in arrears at any given point in time. Related to this objection is the JP's qualification that "'Terminations' means actual residential terminations completed, not the number of termination notices issued." PULP believes it is a mistake not to also place parameters on the number of termination letters issued to avoid the unintended consequence of the Companies issuing termination letters with greater frequency as a way to intimidate customers.

Third, PULP opposes the positive incentive mechanism on the basis that there is no negative incentive. As discussed in Case 14-M-0101, Order . . . , "[p]erformance standards have been a fixture of the Commission's regulatory strategy for many years. They are typically negative adjustments for failure to meet standards related to basic service – reliability and customer service – or specific identified program needs, e.g. stray voltage inspection. . . . There is little controversy over the success of these standards and the merit of retaining them. We agree with Staff that existing measures should generally be retained, although specific measures (such as the stray voltage metric identified in the White Paper) should be examined in rate cases, and, if they have little remaining value, should be adjusted or eliminated."

In Staff's direct testimony, it was suggested that a negative revenue adjustment (NRA) of \$1.26 million should apply to KEDNY if the amount of uncollectibles rose to \$19.7 million or more, or if terminations rose to 41,000 customers or greater.⁴⁴ For KEDLI, Staff's direct testimony suggested a NRA of \$840,000 should apply if the amount of uncollectibles rose to

⁴³ Yates-KEDNY, pgs. 30-36; Yates-KEDLI, pgs. 26-31.

⁴⁴ Staff Consumer Policy Testimony, Pages 42-47, and Exhibit_CSP-4.

\$11.7 million or more, or if terminations rose to 10,000 customers or greater.⁴⁵ However, there are no negative revenue mechanisms for terminations and uncollectibles in the proposed JP, and there is no testimonial evidence for why such NRAs were removed. Therefore there is no rational basis for the removal of negative adjustments for failure to meet standards related to these components of basic residential service, and in light of the Commission's stated policy in the Ratemaking Order, this JP must not be approved because it is inconsistent with State policy.

VIII. THE JP'S RATE DESIGN IS REGRESSIVE AND EXACERBATES THE AFFORDABILITY CRISES FOR LOW INCOME CUSTOMERS

With respect to rate design, throughout the Rate Plan, each rate block will receive an equal percentage increase, with the same high minimum customer charges (or increased charges for some classes) for each firm service classification. (JP, Section IV, 3.3 & Section V., 3.3). Over the past decade, the Companies' fixed cost of basic services has risen 164%. This trend has created a regressive rate design that hurts low-income customers by forcing all customers to pay a steep charge for basic services before paying a rate that varies based on usage. A rate design with lower fixed costs and higher variable costs could benefit low-income, low usage customers without harming the Company's bottom line, would be consistent with the REV proceeding's focus upon promoting conservation and greenhouse gas reduction, and would also be consistent with the Commission's Low-Income Affordability program.

As further explained in Yates Direct Testimony on page 44, lines 6-18, rate designs based on high fixed basic service charges and flat and declining block rates for delivery service create affordability problems for low income customers, and act as a disincentive to conservation and energy efficiency initiatives. Therefore, PULP strongly advocates lowering basic service charges and the rate charged for lower blocks of energy; while at the same time raising the price of delivery for higher blocks of energy. The public interest is better served by achieving rate relief for low-income (and lower-usage) energy customers and to protect against the decline in employment of low-income customers due to unfairly burdened small commercial customers, while also encouraging a reduction in the emissions of greenhouse gases.

The current proposal also includes a further steepening of declining block rates, charging higher volume energy consumers a lower rate of delivery while charging low usage customers a

⁴⁵ *Id.*

higher rate of delivery. Substantial financial benefits could be captured by ratepayers and investors if this design feature was replaced by an inclining block rate. On the ratepayer side, customer bills would be more reflective of how much energy they consumed. This could lead consumers at all levels to conserve more energy and reduce bill sizes. On the investor side, no revenue is lost as the cost of delivery would merely be redistributed across different energy blocks and the need for long-term low income assistance programs will decrease as bills for low income, low usage customers would decrease. In sum, the JP ignores rate design features that could better protect ratepayers while also protecting the interest of investors. Any rate change approved by the Commission must correct this flaw, and failure to balance ratepayer and investor interests as is mandated under the *Hope* test for just and reasonable rates.

IX. THE JP'S EARNINGS SHARING MECHANISM IS OVERLY GENEROUS AND STRUCTURALLY FLAWED

The rate plan includes an earning sharing mechanism (ESM) in which customers will share earnings in excess of 9.5% (50 basis points above the allowed ROE). (JP, Section IV, 4.3 & Section V, 4.3) A reasonable ESM is one that protects customers in the event that there is an over-earning by the Companies and incentivizes the Companies to find savings which would be recognized in any future rate proceedings. 2015 *NYSEG and RG&E Rate Cases*, Order Approving Electric and Gas Rate Plans in Accord with Joint Proposal (issued June 15, 2016). The ESM can be structured in a way that provides more benefits to ratepayers. In a JP involving Upstate Grid, sharing with ratepayers would begin with the **first** dollar above the allowed return:

5.5 Earnings Sharing Mechanism

If the Company's cumulative Average Earned Return on Equity over the Term of the Rate Plan, excluding the discrete incentives and negative revenue adjustments set forth above, exceeds the earnings sharing threshold of 9.3 percent, then Niagara Mohawk will defer for refund to customers a credit as set forth below:

5.5.1 Sharing > 9.3% and ≤ 10.3%

For the first 100 basis points above the earnings sharing threshold (i.e., > 9.3 percent, but ≤ 10.3 percent), 50 percent of the revenue equivalent of earnings will be deferred for the benefit of customers and 50 percent will be retained by the Company.

5.5.2 Sharing > 10.3% and ≤ 11.3 %

For the next 100 basis points (i.e., > 10.3 percent but ≤ 11.3 percent), 75 percent of the revenue equivalent of earnings will be deferred for the benefit of customers and 25 percent will be retained by the Company.

5.5.3 Sharing >11.3%

90 percent of the revenue equivalent of earnings in excess of 11.3 percent will be deferred for the benefit of customers and 10 percent will be retained by the Company.⁴⁶

There is simply no compelling logical or factual reason for a dead band such as the one proposed in the JP other than saying it was a result of compromises among the parties. Additionally, design of a ESM has in the past responsibly assigned a portion of the excess earnings to a specific cost center, like SIR costs as in the current Consolidated Edison Joint Proposal, as discussed in our modifications to the JP section below.

However, the proposed ESM in the JP is one based upon the underlying ROE, and includes a dead band that has no support in the record. As argued above, the ROE is unsupported and therefore, there is no rational basis for its adoption. By extension therefore, the ESM is overly generous, is not supported by the record, and negatively impacts ratepayers who could be achieving even more savings if the ESM were set lower, and based on a reduced ROE. Additionally, if the multi-year plan is accepted, the “dead band” prior to any sharing of excess

⁴⁶ Cases 12-E-0201 & 12-G-0202, *Niagara Mohawk-Electric and Gas Rates*, Joint Proposal (filed December 7, 2012), pp. 25-26.

earnings with customers should be rejected to prevent exploitation by the regulated business, which being allowed to “overearn” and keep 100% of such monies during the multi-year plan, would have no incentive to come back for a rate case.⁴⁷

X. SUGGESTED MODIFICATIONS TO THE JOINT PROPOSAL

The Commission should reject, or in the alternative modify, the joint proposal because key elements are not in the public interest as argued above. PULP suggests at a minimum the following modifications to the JP.

A. Fair ROE and ESM Based on Hearing Record

Savings from a lowered ROE and ESM could result in a significant reduction of rates, and customer bills, in the Rate Plan. In the absence of evidence on the issue, the ALJs should make their independent recommendation of a fair ROE and ESM based on the evidence at the upcoming hearing. Given the RDM and other reconciliation mechanisms, and other cost items, the Companies' risks are sufficiently lowered as to obviate the need for risk hedging through increases to the ROE and ESM, and its ROE should reflect that lower risk.

B. Companies to Share in SIR Costs

Consistent with the findings of the Commission's SIR Order, PULP believes, at a bare minimum, that the rate plan resulting from this proceeding should contain an ESM that provides for use of all excess earnings to pay down SIR costs, just as the Commission approved in several utility joint proposals previously.⁴⁸ More importantly, it is inconceivable that the JP does not include any type of market-based inducement for the Companies to overcome their business-as-usual inertia and strenuously advocate to lower their SIR expenses. Nor is there any inducement in the JP to overcome a problem with New York's regulatory regime that allows shareholders to earn a return on SIR expenses. Accordingly, to repair this fatal flaw in the JP, the Commission

⁴⁷ *Farmers Union Cent. Exchange, Inc. v. Federal Energy Regulatory Com.*, 734 F.2d 1486 (DC Court of Appeals 1984).

⁴⁸ Cases 13-E-0030 *et al.*, Order Approving Electric, Gas and Steam Rate Plans in Accord with Joint Proposal 26-27 (February 21, 2014); 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); Cases 09-E-0588, *et al.*, *Central Hudson Gas & Electric Corporation – Rates*, Order Establishing Rate Plan (issued June 18, 2010), Appendix A, p. 16.

should require to shareholders to absorb at least 15% of SIR expenses. Only a “market-oriented” technique would align the Companies’ interests with ratepayers’ interests.⁴⁹

C. Reconsideration of Rate Design

As noted above, substantial financial and environmental benefits could be captured by ratepayers and investors if the JP’s declining block rate design were replaced by an inclining block rate. On the ratepayer side, customer bill impacts and per unit rates would be more reflective of how much energy they consumed. This could lead consumers at all levels to conserve more energy and reduce bill sizes, both important public policy objectives of the Commission and of the Governor. On the investor side, no revenue would be lost as the cost of delivery would merely be redistributed across different energy blocks and the need for long-term low income assistance programs would decrease as bills for low income and/or low usage customers would decrease. In summary, the JP ignores rate design features that could better protect ratepayers while also protecting the interest of investors. Any rate change approved by the Commission must correct this flaw.

D. Incentive Mechanism

As suggested in Yates’ rebuttal testimony, an independent working group should be established with the authority to (a) audit all of KEDNY’s accounts “Eligible for Field Action” as of December 31, 2015 and terminations from January 1, 2016 to the present; and (b) audit all of KEDLI’s residential terminations from January 1, 2014 through the present. These audits would help ensure the Companies’ are in compliance with HEFPA; in particular, whether customers are provided with the opportunity to negotiate and execute affordable DPAs. This auditing could be used to determine an appropriate annual level of terminations upon which to assess future performance. Since, the JP already contemplates that KEDLI performance metrics will be set at a future date after discussion among Companies, Staff and interested parties, PULP suggests that at the very least, an audit on KEDLI’s terminations be performed as part of the discussions that are set to occur in March of next year.

⁴⁹ See, generally, Case 14-M-0101, *supra*, Order Adopting a Ratemaking and Utility Revenue Model Policy Framework (issued May 19, 2016).

XI. CONCLUSION

The Joint Proposal should not be approved for the reasons articulated above. In the absence of PULP's modifications, the JP's rates would not be just and reasonable. Further, as discussed, the JP contains policies that are not in the public interest.

Dated: September 16, 2016

Respectfully submitted,

/s/

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