STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission As to the Rates, Charges, Rules and Regulations Of New York State Electric & Gas Company for Electric and Gas Service	**Cases 22-E-0317 & 22-G-0318**
Proceeding on Motion of the Commission As to the Rates, Charges, Rules and Regulations Of Rochester Gas and Electric Company for Electric and Gas Service	**Cases 22-E-0319 & 22-G-0320**

FOSSIL FREE TOMPKINS
Post Hearing Brief

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INTRODUCTION

Following the evidentiary hearings, Fossil Free Tompkins (FFT) continues[1] to have concerns that supporters of the Joint Proposal (JP) have failed to meet the burden of proof described in 16 NYCRR §61 as required by the Procedural Guidelines for Settlement Proceedings[2] and that as such, the JP is not in the public interest, and should not be supported. Moreover the sweeping assertion of confidentiality regarding content of settlement proceedings directly interferes with meeting that burden of proof. For the reasons detailed below, FFT suggests that the overly broad application of confidentiality is not in the public interest.

The original testimony of the Department of Public Service staff (DPS Staff or Staff) identified many concerns with the Companies' original CapEx filings.

The Staff Electric Infrastructure and Operations Panel (SEIOP) testimony summarized their concerns[3]:

> Q. How did the Panel find the review of the Companies' proposal for this rate proceeding?
> A. The Panel found it to be difficult to find consistent and detailed information in its review of the Companies' proposal. The initial filing lacked some crucial information and the numerous rounds of IRs [information requests] from the Panel were answered insufficiently by the Companies.
>
> Q. In this rate proceeding, did the Companies provide adequate project justification and necessary work papers for the Panel to review?
> A. No. Our experience was much like that described by the 2019 Staff EIOP. The Companies provided vague, inconsistent answers or failed to provide necessary documentation.

Staff Gas Infrastructure and Operations Panel (SGIOP) testimony reflected similar concerns[4]:

> Q. Does the Panel have any concerns with the information provided by the Companies during the discovery phase of this proceeding?

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[1] See FFT reply to JP statements in Support, 7/07/2023 DMM 119

[2] Procedural Guidelines for Settlements, Cases 90-M-0255 and 92-M-0138 p. 3 states that "In the case of proposals which could affect materially a utility's rates or charges, the proposals shall be supported by documentation of the quality and detail required for major rate case filings. This supporting data is required even if the filing is, in the first instance, a proposal for a rate settlement but not in the form of a traditional rate case filing. In all rate proceedings, the supporting documentation required shall include the relevant information discussed in Part 61 of the Commission's Rules of Procedure, 16 NYCRR." Further, Speculative or conjectural data are not acceptable and all estimates must be explained in detail and the bases definitely established. 16 NYCRR § 61.4

[3] Staff Electric Infrastructure and Operations Panel Testimony, 9/26/22; pp 16-17

[4] Staff Gas Infrastructure and Operations Panel Testimony, 9/26/22; pp 9-10

> A. Yes, we have significant concerns about the way the Companies responded to our IRs, which showed a lack of transparency with respect to the cost estimating processes used to develop forecasted capital expenditures. We asked multiple rounds of IRs for many of the capital projects, and we requested that the Companies demonstrate how capital cost estimates were determined. However, we received only vague responses.
>
> Q. Do you have any other concerns about the Companies' lack of a verifiable cost estimate?
> A. Yes. First, we are concerned about the process in this rate proceeding. If the Companies do provide detailed cost estimates later in this proceeding, whether during or after litigation or during negotiations, review of the information, would be very time consuming and difficult to complete given the time constraints associated with litigation or negotiations. These time constraints are particularly troublesome considering the number of projects that the Companies did not provide cost estimate details for. Additionally, we note that reviewing that type of information is typically done during the discovery phase of rate proceedings. Second, as a longer-term focus, we are concerned about future rate filings and a repeat of this situation.

Staff's original concerns were not trivial and the public has a right to know how these concerns have been resolved in the JP. Exhibit 601, involving a series of IRs about various CapEx programs, asked Staff what new information they had obtained since their original testimony such that Staff was able to support funding for various CapEx projects in the JP. FFT's cross-examination sought to further clarify how Staff's concerns were resolved and how ratepayer's interests were protected. Yet it became clear that our exploration was thwarted by the confidentiality of settlement negotiations.

Excerpted below are several passages from the evidentiary hearing on July 18th pertaining to the confidentiality of settlement proceedings. After identifying these passages, FFT will present a discussion about how confidentiality has interfered with meeting the burden of proof and is not in the public interest.

First, we present this dialogue regarding Gas Regulator Stations beginning on Transcript pg 289, line 22 where FFT asked in the absence of historical cost information how the budget for [gas] regulator stations was determined. Company counsel objected because the answer would

require information from confidential settlement negotiations. The objection was sustained, and

ALJ Bergen explained, on Transcript pg. 290, lines 15-25:

> A.L.J. BERGEN: Just as a reminder, the parties are not allowed to discuss any details regarding the negotiation of any aspect of the Joint Proposal. So to ask, you know, why is this number this number versus that number, the standard response is this is a negotiated Joint Proposal. And the understanding is parties had to -- you know, there was some give and take involved to come up with a comprehensive settlement that everyone, you know, hopefully was equally unhappy with and equally happy with.

On page 298, lines 16-25 FFT asked

> [H]ow are the three [regulator station] projects selected to Individual Net Plant Reconciliation with separate net plant targets, with downward only reconciliation and related status reporting?
> MR. FITZGERALD: Your Honor, I'm objecting again because we are getting into the context and the heart of settlement discussions.
> A.L.J. BERGEN: Specific determinations about what treatment to provide to these projects was part of a settlement negotiation.. And the specifics about how certain things were arrived at among the parties in settlement are confidential.

After FF completed cross-examination on Gas Regulator Stations, on Transcript page 303-304, lines 13-24, 2-3 the following dialogue took place.

> A.L.J. BERGEN: It's a follow up to staff and the company. Without revealing confidential settlement negotiation details, were the parties aware of and familiar with the settlement guidelines as issued by the Commission? One of the factors being, is the outcome within the range that could be expected had the case gone to full litigation?
> A. (EUTO) This is Jeremy Euto for the companies, Your Honor. Yes, the companies believed that it is within the reasonable range that would be the outcome of litigation.
> A.L.J. BERGEN: I'm waiting just to see if staff would like to add to that.
> A. (TIMBROOK) Staff would concur.

Recross Examination by Staff counsel, Transcript page 325, lines 12-24 asked

> BY MR. KRAMER:
> Q. Good a -- good morning panel. You may recall earlier, you were crossed by Ms. Weiser. And one of the areas that she was crossing you on was regarding your statements in your pre-filed testimony regarding the information provided in the company's filing.
> And I want to ask this -- this one question of -- of the panel. Did staff have sufficient information at the time the Joint Proposal was signed to -- to substantiate all the proposals contained therein in the -- in the Joint Proposal?
> A. (POWERS) Yes.

Mr. Mager objected to the above question by Staff Counsel, stating on page 326 line 23 through page 327 line 8 and then on page 328 line 24 through page 329 line 5 of the Transcript, that

> parties opposed to the Joint Proposal, or at least portions thereof, have to show that the entire Joint Proposal was contrary to the public interest, yet, we're not allowed to discuss anything that was said or -- or proposed during the negotiations themselves. It sounds like staff is saying that the -- that whatever issues it may have had with the company's filing were somehow cured, at least in part due to negotiations that the other parties cannot question them on... I guess another way of phrasing my concern is that staff is saying, I think explicitly or at a minimum, implicitly that information that it gained during the settlement negotiations, alleviated some of its concerns. But of course, that information we cannot get at.

ALJ Lecakes responds to Mr. Mager, stating on Transcript page 329 line 16 through page 330 line 19.

> So I'm going to try to -- to summarize the dispute as I see it and -- and the issue and -- and then resolve it. Basically, the parties who are supporting the Joint Proposal do have the burden of proof that in the initial instance, the Joint Proposal is in the public interest. To the extent that staff relied on information that it gained through informal discovery, it cannot put that information before the Commission to the extent that it didn't follow up with formal I.R.s. However, that being said, there are two things that alleviate that -- that problem. The first being that it was information supplied by the company to staff. It is company information and the company as a party to the Joint Proposal is allowed to provide that information with the proper foundation regardless of whether staff asked for it or not if -- if we need it to fill the hole in the record.
> But the second issue which tend to implicate clean hands is that even if staff has not asked a formal I.R. for information received informally, M.I. and the other parties have a right to ask formal discovery on the different topics that are discussed during settlement negotiations, obviously not about positions, but for foundational materials such as -- as the basis for capital expenditure projections and -- and estimates.

DISCUSSION

FFT asserts that the cloak of confidentiality afforded to everything that takes place in settlement proceedings does not serve the public interest and has resulted in a JP that does not meet the burden of proof required by Settlement Guidelines.

The assertion of confidentiality invoked by Staff during cross examination on CapEx projects and supported by the ALJs impedes rational evaluation of the Joint Proposal. As noted in Staff's Electric, Gas and Shared Services CapEx testimony, there were significant deficiencies in the Companies' original filings that were not resolved despite Staff's multiple IRs. Further, per ALJ

Lecakes' response to Mr. Mager, AARP did issue IR's (Exhibit 601) after the JP was published to try to elicit information about how the concerns Staff identified in their original testimony about CapEx projects had been resolved. In only one case, IR 51, regarding "ongoing asset condition projects" did Staff reply that they obtained new information after the date their original testimony was published. Because of settlement confidentiality, during the evidentiary hearing, FFT was unable to elicit information to demonstrate how the many problems identified by Staff have been cured. Given this lack of factual information provided in the record, FFT asserts that the burden of proof required by 16 NYCRR §61 and settlement guidelines has not been met. Further, without information on how the deficiencies were cured, we question how the Commission will be able to provide a rational basis for decision making on the CapEx expenditures proposed in the JP.

Another tenet of the settlement process is that the process be fair. Yet confidentiality precludes parties from identifying any number of potential procedural problems. For example, parties would not be able to disclose anything about how meetings were conducted, how agendas were set and by whom, the timing and scheduling of meetings, the availability of materials before, during or after meetings, audio/visual quality, etc. Yet because of the confidentiality of settlement proceedings, none of these procedural matters can be discussed. Notably, at several times during this proceeding, multiple parties opposed extension of the suspension period citing among other things that they found settlement discussions to be "unproductive."

FFT is particularly troubled by the line of questioning that followed our cross examination. In one instance, staff and company were asked if they believed the outcome of the settlement was better than the outcome that would be achieved by litigation, and both parties replied Yes. In the other instance, the Staff was asked if at the time the JP was signed they had

sufficient information to substantiate all the information proposed therein, and Staff replied Yes. In both instances, material assertions were made that go to the heart of the nature of a settlement, yet because of the confidential nature of settlement proceedings, there is no way for parties opposing the settlement to challenge those assertions as confidentiality precludes them having access to or disclosing the needed information. Even if these statements had not been made during the evidentiary hearing, they are part of the boilerplate language and tacit assumptions that undergird any joint proposal. The result of these unimpeachable assertions and assumptions is to turn the burden of proof required in the settlement process on its head – such that it now becomes the burden of parties opposing the settlement to demonstrate that the JP is not in the public interest, while simultaneously precluding open access to the information that would enable them to do so. Thus, the cloak of confidentiality provides an unfair advantage to parties supporting the JP while leaving parties that oppose virtually impotent to challenge it. This perversion of the settlement process resulting from blanket application of settlement confidentiality is clearly not in the public interest.

Additionally, asserting that Staff has the information needed while not disclosing that information because of confidentiality leads to an unfortunate "trust us" dynamic that Public Officer's Law PBO § 84 seeks to guard against.

> The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.
>
> **As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.** (emphasis added)

> **The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality**. (emphasis added)
>
> The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

CONCLUSION

To summarize, FFT believes that the JP does not serve the public interest because the overly broad assertion of settlement confidentiality has

- prevented the development of a record that allows a rational basis for decision making;
- has resulted in a failure to meet the burden of proof required by Settlement Guidelines and 16 NYCRR §61, while shifting the burden of proof onto JP opponents
- and has thwarted the public's right to access information on government decision-making.

FFT Remains Concerned that No Cost/Benefit Analysis Was Conducted When Deciding To Go With a Six-Year Trim Cycle Over a Five-Year Trim Cycle.

During the evidentiary hearing, FFT asked questions relating to the JP's plan to establish a 6-year cycle trim, over a 5-year cycle trim, the latter of which is considered "best practices."[5] FFT firmly believes that a 5-year trim cycle would have better results when it comes to resiliency, preventing service outages due to vegetation related interruptions, as well as long-term costs. During cross examination of the witness panel, in relation to their justification supporting a 6-year cycle versus a 5–year cycle, Staff admitted that they "... did not undertake a

[5] Companies Statement in Support at 31; "... the Joint Proposal takes another step closer toward NYSEG achieving a five-year distribution vegetation management trim cycle, which is considered a best practice in the industry and is consistent with Staff's 2018 Winter and Spring Storms Investigation Report filed on April 18, 2019, in Case 19-M-0285."

typical benefit cost analysis when … recommending a six-year cycle in the Joint Proposal."[6] Not conducting a cost-benefit analysis is a significant concern for FFT as the Staff[7] and Companies Statements in Support, as well as the JP, all point to the decision to use a 6-year trim cycle, instead of a 5-year trim cycle, as a means of making the rates more affordable. Even at the hearing, Staff indicated that their goal with the 6-year trim cycle would take "into account affordability."[8] Without conducting a traditional cost-benefit analysis and comparing the outcomes associated with a 5-year trim cycle versus a 6-year trim cycle, FFT does not believe that the panel can make the justification that costs will be saved.

For the foregoing reasons, FFT urges the Commission to reject the Joint Proposal and to proceed with litigation. Further, FFT asks that all make-whole provisions be denied.

[6] Evidentiary Hearing Transcript, July 18, 2023 at 359.
[7] See, DPS Staff's Statement in Support, "Staff determined that adding an additional year would provide adequate time to fully trim the entire NYSEG system and lessen the burden on ratepayers." at 24.
[8] Id.