

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on May 16, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 06-E-1433 - Proceeding on Motion of the Commission as to
the Rates, Charges, Rules and Regulations of
Orange and Rockland Utilities, Inc. for
Electric Service

ORDER DENYING PETITION FOR REHEARING

(Issued and Effective May 18, 2007)

BY THE COMMISSION:

This case was instituted by our direction to Orange and Rockland Utilities, Inc. (Orange and Rockland) to show cause why it should not file tariffs to reduce its electric rates.¹ The Administrative Law Judge (ALJ) assigned to the case established a schedule designed to enable us to consider, at our April session, the issue of whether the company's rates should be made temporary pending that determination (so that we could order refunds if those rates were found to be excessive). The Department of Public Service staff (DPS Staff) and the Consumer Protection Board (CPB), supported by the Town of Ramapo, appealed the ruling and we directed the ALJ to develop a record on a schedule that would enable us to resolve the temporary rate

¹ Case 06-E-1433, Orange and Rockland Utilities, Inc. - Electric Rates, Order Instituting Proceeding and to Show Cause (issued December 15, 2006) ("Show Cause Order").

issue at our February session.² Rates were made temporary on March 1, 2007.³ Orange and Rockland seeks rehearing in a petition filed March 24, 2007, asserting that the Appeals Order denied it due process, and is inconsistent with the Order to Show Cause initiating the proceeding, as well as with the Public Service Law (PSL). The company also seeks oral argument. Orange and Rockland's analysis of the governing law is unpersuasive, and it has not shown a basis for granting oral argument. We will deny its petition for rehearing.

DISCUSSION

Due Process

Orange and Rockland argues that the Appeals Order rests on a false premise. Although the company states it does not necessarily believe that expeditious consideration of temporary rates creates a violation of due process, it asserts that when the extent of such acceleration precludes a fair and reasonable opportunity to develop a record as to whether the public interest requires the imposition of temporary rates and to present briefs to us, we have signaled our intention to accord less than full and fair consideration to that record and deny due process. Orange and Rockland argues that the effect of the Appeals Order to deny due process is shown by DPS staff and CPB statements that they had insufficient time to analyze the company's position.

Orange and Rockland claims as well that the Commission has misunderstood its position and that it does not dispute that

² Case 06-E-1433, supra, Order Concerning Interlocutory Appeals (issued February 1, 2007)("Appeals Order").

³ Case 06-E-1433, supra, Order Making Temporary Rates Subject to Refund (issued March 1, 2007), and Orange and Rockland has not sought rehearing of that order.

PSL § 114 requires a lesser quantum of evidence for temporary rates than that necessary for permanent rates. However, the utility goes on to argue that the Appeals Order confuses the determination of whether to impose temporary rates with the determination of the level of those rates.

Orange and Rockland has shown no violation of due process here. Its time for submission of evidence was not shortened and it was given a full opportunity to attempt to introduce all the evidence it wanted at the time of the hearing on temporary rates.⁴ It has thus had the opportunity to make its case, including a hearing at which it presented rebuttal and oral argument to the ALJ in lieu of briefing. It is entitled to no more. That other parties have felt pressed for time does not create a violation of the utility's due process rights. In any event, those parties were able to make demonstrations that the company may be overearning that we have found sufficiently persuasive to justify making existing rates temporary.⁵

Orange and Rockland's recognition that a lesser quantum of evidence is necessary for temporary rates cuts heavily against its objection to expedition of our consideration of temporary rates. The company also makes too much of the supposed distinction between a decision to impose temporary rates and a decision on the level of those rates. That claimed distinction has no relevance to this case, where we decided to make the existing rates temporary. However, the quantum of evidence necessary to make rates temporary would not be different from that needed to determine temporary rate levels.

⁴ Moreover, since DPS staff and CPB objections were overruled, all of the company's evidence was introduced.

⁵ Case 06-E-1433, supra, Order Making Temporary Rates Subject to Refund (issued March 1, 2007) ("Temporary Rate Order").

PSL §114 provides that we may set temporary rates if we are of the opinion that the public interest so requires. We have already explained in our Temporary Rate Order that our analysis of the company's likely earnings and its growing deferral balances showed that if we failed to make the existing rates temporary, customers may have to pay excessive rates until we resolve this case. That same sort of analysis could have been used to determine a temporary rate reduction.

Consistency with the Show Cause Order

Orange and Rockland says that the Show Cause Order required it to demonstrate why a reduction to the company's electric rates should not be required and directed the company to present detailed information on that issue. The company says it complied with that directive, but that the Appeals Order contradicts the Show Cause Order insofar as the Appeals Order states that while the company will not be precluded from addressing issues it deems relevant, some of the presentation required by the Show Cause Order may be irrelevant to temporary rates. The company accuses us of prejudging the threshold issue in the proceeding as set forth in both the Show Cause Order and the statute, which it says is whether temporary rates should be imposed. Orange and Rockland alleges that prejudgment is evidenced by our statement that temporary rates merely preserve our flexibility because they may be trued-up. It argues that our adoption of such a position reflects an intention to lower the bar for determining whether temporary rates are imposed and abandon an obligation to consider the company's circumstances. It also claims any such position is short-sighted inasmuch as the company's customers will ultimately pay through higher rates in the long term for the increased cost of debt it believes will result from the decision.

Orange and Rockland confuses the ultimate issue in the case of the appropriate level of permanent rates with the interim issue of the setting of temporary rates pending a decision on permanent rates. It also mixes the question of whether to set temporary rates with the question of whether we properly acted expeditiously in doing so. We may well reasonably rely on the more elaborate information stated in the Show Cause Order in setting permanent rates, without basing the decision on temporary rates on that information. We did, however, leave Orange and Rockland with a full opportunity to present evidence on the establishment of temporary rates and we carefully evaluated that evidence in our Temporary Rate Order. Tellingly, Orange and Rockland does not rebut our analysis of the relevant precedent suggesting a lesser quantum of evidence to set temporary rates.⁶ We did not "prejudge" the issue of whether to set temporary rates, but simply recognized that Public Service Law §114 allows us to protect utilities and customers, via true-up, from temporary rates that prove to be incorrect in a proceeding we commence. However, the utility's arguments as to why temporary rates may be short-sighted and impose certain costs completely overlook that absent temporary rates we would not be able to protect ratepayers if existing rates prove to be too high.

Public Service Law §114

Orange and Rockland argues that the statute only provides for implementation of temporary rates if after a hearing it is determined that the public interest so requires. It says that without first determining that the public interest requires the implementation of temporary rates, the statutory

⁶ Appeals Order, p. 10(discussing case law).

basis for temporary rate action is not met. The company argues that this statutory prerequisite is not obviated by a "true-up" or the desire for expedition, and requires consideration of its forecast earnings and the impact of temporary rates. It further contends that temporary rates are clearly the exception to the rule that our power to fix rates is prospective only, and absent a threshold determination that the company's permanent rates are contrary to the public interest, the Commission cannot wield its temporary rate authority.

Orange and Rockland further argues the Commission cannot just rely on the company's past earnings or the five percent floor, and that increasing deferred costs are not a reason for temporary rates. It claims that it bears particular mention that prior temporary rate decisions have not resulted from compressed proceedings. The company cites a recent New York State Electric & Gas Corporation (NYSEG) case where the temporary rates were considered only after a hearing and four rounds of briefs on temporary rate issues.⁷ Orange and Rockland also claims that imposition of temporary rates here would amount to an unprecedented and unexpected change in policy. It asserts that either its earnings forecast must be accepted or hearings for consideration of its position must be reconvened, followed by briefing.

⁷ Case 01-E-0359, New York State Electric & Gas Corporation, Order On Temporary Rates (issued January 10, 2002). The temporary rates were postponed, Case 01-E-0359, supra, Order Modifying Schedule for Temporary Rates (issued January 18, 2002), Second Order Modifying Schedule for Temporary Rates (issued February 20, 2002); and then superseded, Case 01-E-0359, supra, Order Adopting Provisions of Joint Proposal With Modifications (issued February 27, 2002), p. 21; and hence never took effect.

Orange and Rockland misunderstands the purpose of PSL §114, which is to allow us to expeditiously determine an appropriate interim rate in a proceeding we initiate.⁸ We are not setting a rate in a final decision, but deciding what rate shall be charged while that final rate is being set. One factor to be considered as part of the public interest determination is whether to protect customers by making the rate temporary, provide refunds which enables us to provide for refunds to rate payers, if needed. Here, for instance, among the factors supporting temporary rates, as described in the Temporary Rate Order, was the potential disproportion between the growth of the company's deferred balances, which it would seek to recover from ratepayers, and the loss of the earnings sharing that would have reduced the size of the balances. Another such factor supporting temporary rates was the proof adduced that the level of current earnings suggests the company might be able to overearn.

The authority to set temporary rates is, contrary to the company's claims, not an exception to the authority to set rates prospectively, but a necessary concomitant to that authority. Once the Commission decides that rates will not be set finally, but are subject to future adjustment, it can protect the public through such adjustments. The NYSEG case is

⁸ The statute permits use of property account records "to facilitate prompt action by the commission in proceedings involving the reasonableness of the rates of any public utility and to avoid delay in any such rate proceeding(emphasis added)" It also provides that the "commission may, in any such proceeding, brought either on its own motion or upon complaint, upon notice and after hearing, if it be of opinion that the public interest so requires, immediately fix, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding" (emphasis added).

not dispositive. That four rounds of briefs were deemed necessary in a case about setting a temporary rate reduction during the pendency of an existing rate plan has no bearing on the facts of this case, where we make existing rates temporary to address a void created by the expiration of a prior rate plan.

Our Temporary Rate Order also recognizes the different positions that utilities and ratepayers occupy with respect to the ability to protect themselves against adverse earnings results. Those different positions explain some of the differences in our decisions under PSL §113 (utility-initiated proceedings) and PSL §114 (Commission-initiated proceedings) on which Orange and Rockland has apparently sought to rely in claiming that we are not following past decisions.⁹ Since a utility can control the timing of its rate filings and proceedings, we have less reason to protect it through granting it temporary rates under a utility-initiated proceeding covered by PSL §113, than we do to protect ratepayers by setting temporary rates under PSL §114 in a proceeding we commence.

The remainder of Orange and Rockland's analysis simply ignores the text of the statute and our discussion of the case

⁹ PSL §114 should be contrasted to PSL §113. Under PSL §114, we are bound to provide reparations to a company in a proceeding we initiate to order temporary rate reductions, when we subsequently set a permanent rate that is higher than the temporary rate. Under PSL §113, however, we are not required to award reparations when we deny a temporary rate increase, but subsequently set a higher permanent rate in a proceeding begun by a utility. Matter of New Rochelle Water Company v. Public Serv. Comm'n, 31 N.Y.2d 397, 406 (1972). Since utilities generally seek rate increases, while Commission-initiated proceedings generally concern decreases, an oversimplified categorization of the two types of temporary rate proceedings is that one, PSL §114, concerns decreases and the other, PSL §113, concerns increases. Id. at 405-06.

law, which gives us authority to hold ratepayers harmless during utility rate proceedings. Given this purpose of PSL §114, we can use expedited procedures and preclude briefing where appropriate. Here the proceedings have been sufficiently prolonged, and the facts made adequately known, that we could appropriately make existing rates temporary to make sure that ratepayers can be protected in any final decision.

Oral Argument

Orange and Rockland requested oral argument to address the issues raised by the Show Cause Order. It maintains that the issues are not adequately developed and that "there can be no question that the record in this case has not been fully and properly developed due to the severe time constraints imposed by the Commission."¹⁰ It says that setting temporary rates in this instance would be unprecedented as it would strip a company with no record or prospect of poor service or bad management of the opportunity to achieve earnings resulting from its efficient operation for an indeterminate future period. It contends that our action sends a message that rates will be made temporary absent a rate plan addressing earnings levels. As this action is assertedly extraordinary, the company contends it should be allowed oral argument.

The issues as currently presented by Orange and Rockland are largely legal ones about our authority to use PSL §114 to protect ratepayers from excessive rates during the pendency of a proceeding we initiated to consider whether rates should be permanently reduced. We are satisfied based on our review of the law that our action is reasonable.

¹⁰ Orange and Rockland Petition, pp. 7-8.

Further, our Temporary Rate Order explained why temporary rates were needed to protect ratepayers pending the conclusion of this proceeding. A decision to make rates temporary says nothing about the level of company earnings during the temporary rate period; that issue can be addressed when we set permanent rates. We note temporary rates were the subject of oral argument before the ALJ, and hearing yet more argument would not have aided our resolution of those rates. We will conduct such further proceedings as may be appropriate to reach a final decision on permanent rates.

The Commission orders:

1. The petition for rehearing filed by Orange and Rockland Utilities, Inc. in this case dated February 23, 2007, is denied.
2. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary