

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

Case 06-E-1433

MOTION BY THE NEW YORK STATE CONSUMER PROTECTION BOARD FOR
INTERLOCUTORY REVIEW OF JANUARY 18, 2007 RULING AND
FOR EMERGENCY ACTION

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Albany, New York

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The Consumer Protection Board (“CPB”) seeks review of the January 18, 2007 Ruling¹ by the Administrative Law Judge (“ALJ”) in this proceeding pursuant to §4.7 of the New York Codes Rules and Regulations (“NYCRR”).² The relief we request is necessary since extraordinary circumstances exist requiring the immediate establishment of an expedited schedule to evaluate the need for temporary rates for Orange and Rockland Utilities Inc.’s (“Orange and Rockland”) electric delivery service. The ALJ in this case erred in not adopting an expedited schedule that would protect the Company’s ratepayers despite overwhelming evidence that continued delay harms ratepayers and a finding by the Commission itself that issues should be resolved expeditiously. The Commission should treat this as an emergency, since an expedited inquiry is necessary for the preservation of health, safety and general welfare.

¹ Case 06-E-1433, Ruling on Procedure and Schedule, January 18, 2007 (“January 17 Ruling” or “Ruling”).

² 16 NYCRR §4.7.

BACKGROUND

On November 8, 2006, the CPB filed a formal complaint pursuant to Public Service Law (“PSL”) §71, requesting that the PSC immediately initiate a proceeding to investigate the rates charged by O&R for electric delivery service. Specifically, the CPB requested that the Company be ordered to show cause as to why its electric delivery rates should not be reduced, its earning sharing provisions should not be revised and the deferrals it currently receives should not be altered, to establish just and reasonable rates. The CPB requested that these actions be taken “on an emergency basis.”³

The Company responded to CPB’s Complaint by letter dated November 29, 2006, in which it proposed that the active parties attempt to resolve the rate dispute in a “non litigated context” that would afford the Company, Staff of the Department of Public Service and other interested parties the opportunity to submit a joint proposal to resolve these issues by March 31, 2007. The Company suggested that the Commission defer action on the CPB’s Complaint until and unless a joint proposal resolving contested issues was submitted by that date.⁴

The Commission issued an Order on December 15, 2006, in which it commenced its own investigation of the Company’s electric delivery rates. It rejected the Company’s proposal, stating inter alia that “Orange and Rockland’s recent earnings levels indicate that its electric rates may be unjust, unreasonable, and higher than needed to provide safe and adequate service....”⁵ The PSC directed that the Company show cause, within 25 days – by

³ Complaint of the New York State Consumer Protection Board Regarding the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Electric Service, November 8, 2006, emphasis added.

⁴ Letter from Mr. John L. Carley to Secretary Brilling, re: Complaint of the New York State Consumer Protection Board, November 29, 2006.

⁵ Case 06-E-1433, Order Instituting Proceeding and to Show Cause, December 15, 2006, p. 3.

January 9, 2007 – why Orange and Rockland should not be directed to immediately reduce its electric rates. The Commission further stated:

the examination of the Company's rates will be conducted on an expedited basis, due to the Rate Plan's expiration and the need to evaluate its effect on ratepayers and protect them from adverse consequences. Absent implementation of sufficient protection of ratepayers during the proposed four months of negotiation, Orange and Rockland's proposal to allow the parties until March 31, 2007 to reach a joint proposal is unacceptable.⁶

The Commission also stated that:

The Administrative Law Judge assigned to this proceeding will determine procedures and establish deadlines to ensure a prompt resolution of the issues in this proceeding.⁷

On January 9, 2007, the ALJ approved the Company's request for an additional 17 days, until January 26, 2007, to provide materials in compliance with the PSC's Order, over the objections of CPB and Staff of the Department of Public Service ("DPS Staff").⁸ At a Conference later that same day, the ALJ stated her intention to establish a schedule to consider temporary rates for Orange and Rockland's electric operations and a separate schedule to establish permanent rates.

Both the CPB and DPS Staff proposed a schedule for consideration of temporary rates under which the Company would submit the information required by the Commission on January 26, 2007, and a hearing would be held on February 13, 2007. The CPB proposed that the Commission resolve the matter at its February 2007 Session and the DPS Staff proposal suggested a PSC resolution in March 2007. The Town of Ramapo also proposed a PSC decision at its March 2007 Session.⁹ The Company proposed a schedule under which the issue of temporary rates would be considered by the Commission at its April 2007

⁶ Id., pp.4-5.

⁷ Id., p. 5, emphasis added.

⁸ Case 06-E-1433, Ruling Granting Extension of Time, January 9, 2007.

⁹ Case 06-E-1433, Letter from Mr. Christopher P. St. Lawrence, Supervisor, Town of Ramapo, January 17, 2007.

Session. In the January 18, 2007 Ruling, the ALJ adopted the Company's proposal that the matter not be decided by the Commission before April 2007 and granted the Company a further extension to provide materials in compliance with the PSC's Order, until February 2, 2007.¹⁰ The schedule adopted by the Judge apparently results from the conclusion that "at this early stage of this case, I do not want to unduly restrict the information to be considered or the relief to be awarded."¹¹

ARGUMENT

The ALJ's ruling does not give adequate consideration to the need to protect ratepayers. The proper course is for the Commission to consider temporary rates in an expedited fashion. All remaining issues can be considered in due course once ratepayers are protected.

Under PSL §72 and 114, the Commission may establish temporary rates upon notice and hearing. The Commission's December 15, 2006 Order provided the formal notice.¹² Regarding the hearing requirement, the PSL requires only that the Commission demonstrate that the temporary rates would be

sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service, and if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided.¹³

¹⁰ January 17 Ruling, p. 8.

¹¹ Id., p. 3.

¹² Indeed, the Company has been aware since receiving the CPB's formal Complaint on November 8, 2006 that it would be called upon to demonstrate that its rates are just and reasonable.

¹³ PSL §114.

Although the reference to a five percent return may be outdated, the law establishes two fundamental principles: the Commission need only ensure that the utility has a reasonable rate of return, and the PSC may estimate the utility's costs if adequate data are not available.

Case law and PSC precedent are also instructive on these matters.¹⁴ As early as the mid-1900s, the Commission made it clear that the level of information needed to establish temporary rates was substantially less than what would be required for permanent rates.¹⁵

The Maltbie case concludes that

The Commission fixes a temporary rate pending the hearing. It is based upon the elements stated, which are not all of those required to fix a permanent rate. As before stated, this would be impossible, if we must consider in fixing a temporary rate all the elements required for the final rate: no temporary rate could ever be fixed.¹⁶

The PSC has used the abbreviated process authorized in the Maltbie case in numerous instances.

Time is also of the essence. In a case involving Jamaica Water Supply Company,¹⁷ the Commission instituted an expedited schedule to explore the necessity of temporary rates to protect ratepayers pending the outcome of the full rate case. The Commission established temporary rates just 42 days after it provided notice to the utility, and 17 days after it held a hearing. The Commission rejected the utility's vigorous objection that its due process rights were denied by that schedule, concluding that:

the intent of fixing temporary rates is to provide some measure of protection to the ratepayers against excessive rates during the conduct of this investigation. The longer that protection is withheld, the greater the

¹⁴ Case 06-E-1433, Procedural Conference Transcript, January 9, 2007, p. 23.

¹⁵ See, "In the Matter of Bronx Gas and Electric Company, Respondent, v. Milo R. Maltbie et al., Constituting the Public Service Commission of the State of New York, et al.," 271 NY 364, decided July 8, 1936.

¹⁶ Id., p. 374.

¹⁷ Case 92-W-0583, Proceeding on Motion of the Commission to Investigate the Operation and Management of the Jamaica Water Supply Company and its Rates, Charges, Rules and Regulations, Order Instituting Proceeding and Setting Procedures for Temporary Rates, Issued and Effective June 26, 1992.

ratepayers' exposure to permanent, non-refundable rates that ultimately may be found to have been excessive.¹⁸

In contrast, the schedule established by the ALJ in this proceeding would require ratepayers to wait 161 days after the CPB's Complaint was filed, and 124 days after the PSC's Show Cause Order was issued, before the PSC would consider temporary rates. Under the ALJ's schedule, the time between the close of hearings and the PSC's decision would be 49 days, in contrast to the 17 days provided in Jamaica Water.

The absence of any protection for consumers in this situation is the type of extraordinary circumstance contemplated by NYCRR §4.7 and warrants prompt action by the Commission to modify the schedule in the ALJ's January 18, 2007 Ruling. The Commission reported that Orange and Rockland's return on equity was 16.17% for the 12 months ending June 30, 2006.¹⁹ As explained in our formal Complaint and repeated here for convenience, there are several factors that suggest that the utility's return will be even higher after June 30, 2006. First, a key provision of the Company's rate plan expired on that date, under which Orange and Rockland amortized a total of \$11 million of deferred pension and OPEB costs over the three years ending June 30 2006. Since it is no longer required to amortize deferred pension and OPEB costs in that amount, the Company's electric earnings would increase by approximately 370 basis points, to 19.87%, everything else equal. Higher earnings are also expected because the Company projects that its electric capital expenditures in 2007 will be approximately \$3.7 million less than in the twelve months ending June 2006.²⁰

In contrast, the Commission recently determined that a fair return on equity for Orange and Rockland's natural gas operations is 9.19% for a one-year period. It also approved a

¹⁸ Case 92-W-0583, Opinion No. 92-23, 1992 N.Y. PSC LEXIS 32, p. 20, emphasis added.

¹⁹ Show Cause Order, p. 2.

²⁰ CPB Complaint, November 8, 2006, p. 3.

rate of return on equity of 9.55% for a one-year rate case for New York State Electric & Gas Corporation. Using the average of the one-year return in the PSC's two most recent decisions, or 9.37%, the CPB estimated that Orange and Rockland's electric delivery rates could be reduced by approximately \$20 million, or more than \$1.5 million per month.²¹ Since Orange and Rockland has approximately 200,000 electric delivery customers, the CPB estimates that the utility's average customer is paying approximately \$7.50 per month more than what is required for just and reasonable rates.

The CPB continues to be extremely disappointed with actions by the PSC and the ALJ since our Complaint was filed. In our view, the Commission unnecessarily withheld action on our complaint for 37 days, provided instructions to the utility that could not be readily interpreted by the Company or the ALJ which necessitated postponement of the schedule contemplated by the PSC, and apparently required the Company to file an abundance of information that may unnecessarily encumber review by interested parties.

The ALJ erred by creating new requirements for the Company's filing not identified in the Commission's Order, including that it be in the form of testimony. The ALJ also authorized a plethora of procedural requirements that extend the schedule for consideration of temporary rates far beyond what is necessary to satisfy the "notice and hearing" requirement of the PSL. Those unnecessary requirements include rebuttal testimony (7 days), an initial brief (12 days after a hearing), a reply brief (an additional 4 days) and an additional 33 days for the Commission to review the record and reach a decision. Overall, these additional requirements add 56 days to an already protracted schedule. During that almost two-month interval alone, the CPB estimates that the average Orange and Rockland electric delivery customer will be required to pay \$15 more than what is required by law, on top of the excess charges they have already paid.

²¹ Id., p. 5.

The CPB requests that the Commission discard the schedule set by the ALJ, especially the requirements for rebuttal testimony, two rounds of briefs, and an extremely leisurely schedule to prepare an analysis and recommendation for Commission action.²² The CPB recommends that the Commission adopt the following modifications, which will ensure due process and help protect ratepayers from adverse consequences – the stated objective of the Commission’s December 15, 2006 Order. First, the requirement of rebuttal testimony should be eliminated or modified. With a filing date of February 2, 2007, the Company will have had 49 days since the Commission’s Show Cause Order, and 86 days since the CPB’s formal Complaint was filed, to submit information demonstrating that its rates are just and reasonable. Such time is ample to present its complete case. Rebuttal testimony should be permitted only if the Commission advances the date for submitting initial testimony in the ALJ’s schedule commensurately. Second, briefing is unnecessary in these circumstances. The purpose of briefs can be served by permitting the parties to provide oral argument at the hearing. Third, post-hearing procedures should be expedited by adopting measures such as direct participation by Commissioners at the hearing, issuance of a one-Commissioner Order to resolve this matter and/or a special session of the PSC. The circumstances in this case demand that the Commission take all reasonable means to protect consumers, and not treat this matter in a business-as-usual fashion.

The Commission should treat this matter as an emergency. The notice and comment requirements of the State Administrative Procedure Act (“SAPA”) Section 201(1), should be waived, pursuant to Section 202(6)(a) of SAPA, since an expedited inquiry is necessary for the preservation of health, safety and general welfare. As required by §3.5(j) of the

²² For purposes of this request, the CPB takes as given, based on a previous ALJ Ruling, that the Company will not submit information demonstrating the reasonableness of its rates until late January 2007.

Commission's rules, a statement regarding the need for the Commission to take action on an emergency basis is attached to this complaint.

CONCLUSION

For the reasons set forth herein, the Public Service Commission should review and alter certain aspects of the Administrative Law Judge's Ruling of January 18, 2007 in this proceeding. The Commission should establish a schedule that permits it to consider temporary rates as soon as possible, and no later than the end of February 2007.

Respectfully submitted,

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Director of Utility Intervention

John M. Walters
Intervenor Attorney

Dated: January 19, 2007
Albany, New York

ATTACHMENT

The Motion requests that the Commission take action on an emergency basis pursuant to SAPA §202(6). Accordingly, as required by §3.5(j) of the Commission's rules, we include the following statement concerning the need for such action:

Orange & Rockland's earnings for its electric delivery operations far exceed the levels associated with just and reasonable rates. In addition, based on available information, these unreasonably high rates are expected to continue in the future. These high prices have an adverse impact on the utility's electric delivery customers, particularly low-income families for whom energy costs represent a substantial percentage of family budgets. The public health, safety and general welfare requires that this issue be investigated, and resolved, on an emergency basis pursuant to §202(6) of the State Administrative Procedures Act, and that the notice and comment requirements of §202(1) of the Act be waived.