# STATE OF NEW YORK

6557

2023-2024 Regular Sessions

# IN SENATE

April 26, 2023

Introduced by Sen. MAYER -- read twice and ordered printed, and when printed to be committed to the Committee on Energy and Telecommunications

AN ACT to amend the public service law, in relation to requiring certain utilities to adopt the common equity ratio and rate of return on equity authorized by the public service commission

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative intent. The legislature finds and declares that:

1. The increasing burden of high utility rates leaves New York residents with extreme financial difficulties. Soaring electricity rates leave one in five New York residents at risk of having their electricity cut off. Meanwhile, the long-term trend of utilities receiving record profits threatens the livelihood of millions of New Yorkers who struggle to afford utility bills.

2. The current process in which the public service commission (hereinafter the "commission") and regulated utilities set rates for utility bills to ratepayers has historically been inaccessible and indecipherable to the public. The balance of power that justifies rate increases more often than not tilts disproportionately in utilities' favor, which runs contrary to the stated goals of the commission to ensure affordable, safe, secure, and reliable utility service for New York residential and business consumers.

3. The generic financing guidance that the commission utilizes to establish the common equity ratio and rate of return on equity, two metrics that determine how much a utility can recoup through utility bills, has not been formally promulgated and adopted through state laws and regulations, and currently exists as policy guidance, a non-legally binding set of interpretations that operate outside the formal rulemak-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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ing process. This creates too lenient a framework in which the commission can justify and approve rate increases from regulated utilities.

4. The generic financing guidance that the commission utilizes to establish the common equity ratio and rate of return on equity is currently drawn from the 1994 "Recommended Decision" (Case 91-M-0509) (Proceeding on Motion of the Commission to Consider Financial Regulatory Policies for New York State Utilities). The generic financing guidance is outdated and does not reflect current economic realities.

5. The determination of a final rate in any rate-case between a regulated utility and the commission, beginning with the utility's initial request, followed by benchmarking against the commission's generic financing methodology, often, if not always, leads to adjudication, resulting in negotiated settlements that disproportionately favor regulated utilities at consumers' expense.

6. Regulated utilities are entitled to earn a fair and reasonable rate of return on their capital investments, pursuant to Supreme Court rulings in Federal Power Commission et al. v. Hope Natural Gas Co. (1944) and Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia (1923). However, recent trends suggest that the "fair and reasonable" legal standard is not reflected in actual utility rates for consumers.

7. Under ratemaking theory, any authorized return must balance the interests of ratepayers and shareholders, where the rate is just high enough to attract needed capital to maintain service reliability, but not set higher than a level to provide shareholders with a profit above what is absolutely necessary to maintain service.

8. Aligning the incentives of regulated utilities and ratepayers is essential to serve the greater interests of all New York residents by establishing a healthy balance between a regulated utility's right to earn a fair and reasonable rate of return, and New York residents' right to have stable utility rates that are as low as possible.

§ 2. The public service law is amended by adding a new section 65-c to read as follows:

<u>§ 65-c. Setting a rate of return on equity and common equity ratio. 1. Definitions. For the purposes of this section, the following terms shall have the following meanings:</u>

<u>(a) "Regulated utility" means an "electric corporation", "gas corporation", "steam corporation", or "water-works corporation" as defined in section two of this chapter.</u>

<u>(b) "Generic financing methodology" means a standardized procedure for determining the authorized rates of return on equity and common equity ratios of utilities regulated by the commission.</u>

<u>(c) "Authorized common equity ratio" means the authorized percentage of a utility's total capitalization, such as common equity, preferred stock, and long-term debt, that consists of common equity, retained earnings, and capital surplus.</u>

<u>(d) "Actual common equity ratio" means the actual percentage of a utility's total capitalization, such as common equity, preferred stock, and long-term debt, that consists of common equity, retained earnings, and capital surplus.</u>

<u>(e) "Authorized rate of return on equity" also known as return on equity ("ROE") or the cost of equity capital, means the return on the equity portion of the rate base that regulated utilities are authorized to collect in rates.</u>

<u>(f) "Actual rate of return on equity" means a measure of financial performance calculated by dividing net income by shareholders' equity.</u>

(g) "Rate-case" means a litigated and/or negotiated proceeding between a regulated utility and the commission in an effort to finalize the authorized common equity ratio and authorized rate of return on equity that determines utility rates charged to consumers; where a regulated utility first files a rate proposal with the commission, supported by expert witnesses, evidentiary documentation, and exhibits, followed by the commission's evaluation of the proposal in comparison to its own common equity ratio and rate of return on equity, which is generally followed by adjudication en route to settlement.

(h) "Rate period" means the time period in which a regulated utility collects rates that are authorized and approved by the commission.

(i) "Publicly available data" means published data that is directly accessible without charge via the internet, or indirectly accessible without charge through a public library or similar institution.

2. Setting the generic financing methodology; common equity ratio; rate of return on equity. (a) On an annual basis, the commission shall promulgate rules and regulations that:

(i) update the generic financing methodology such that, to the greatest extent possible, all of its calculations are based upon publicly available data;

(ii) set a fair and reasonable authorized common equity ratio for each regulated utility and a single authorized rate of return on equity for all regulated utilities, based on the generic financing methodology; and

(iii) reconcile the prior rate period's authorized rate of return on equity to a calculation of the average monthly rate of return on equity produced by the generic financing methodology for that rate period, such as a "true-up mechanism". In making this determination, the commission shall require that: (A) any revenues derived from an authorized rate of return on equity exceeding the average monthly rate of return on equity be returned to ratepayers in the form of a surcredit to their bills for the following rate period; and (B) any revenues that would have been derived from an average monthly rate of return on equity exceeding the authorized rate of return on equity shall be recovered from ratepayers in the form of a surcharge to their bills for the following rate period.

(b) The promulgated generic financing methodology, authorized common equity ratio, authorized rate of return on equity, and the prior year's average monthly rate of return on equity shall clearly state the methods used to justify and explain its proposed guidance.

(c) The promulgated generic financing methodology, authorized common equity ratio, authorized rate of return on equity, and prior rate period's average monthly rate of return on equity shall be subject to traditional notice and comment procedures, as outlined in the state administrative procedure act, which shall include input from public interest organizations, utility accounting experts, representatives from regulated utilities, and other organizations and interested parties, including residents of this state, as necessary.

(d) The final generic financing methodology, authorized common equity ratio, authorized rate of return on equity, and prior rate period's average monthly rate of return on equity adopted by the commission, following the notice and comment period, shall give preference to the best interest of the ratepayers.

3. Adopting the authorized common equity ratio, authorized rate of return on equity and/or prior rate period's average monthly rate of return on equity. Except as provided in subdivision four of this section, every regulated utility shall:

(a) adopt the authorized common equity ratio based on the generic financing methodology for the following rate period as set specifically for each regulated utility by the commission;

(b) adopt the authorized rate of return on equity based on the generic financing methodology for the following rate period; and

(c) adopt the surcredit/surcharge based on the prior rate period's average monthly rate of return on equity, as outlined in subdivision two of this section, for the following rate period.

4. Rebutting the authorized common equity ratio, rate of return on equity, and prior rate period's average monthly rate of return on equity. (a) The burden of rebutting the authorized common equity ratio, authorized rate of return on equity, and/or prior rate period's average monthly rate of return on equity shall rest exclusively with the regulated utility during a public hearing facilitated by the commission. In order to rebut the authorized common equity ratio and/or authorized rate of return on equity, the regulated utility shall first initiate a request for public hearing through procedures outlined by the commission. Should the commission find a substantial basis for the claims outlined by the regulated utility in its request, it shall publish a set of dates from which a public hearing shall take place.

(b) During the public hearing the regulated utility shall:

(i) present documentary evidence, including but not limited to exhibits, written and oral testimony, and data, describing why the authorized common equity ratio, authorized rate of return on equity, and/or prior rate period's average monthly rate of return on equity is insufficient to meet its current and/or future operating and capital needs;

(ii) present documentary evidence, including but not limited to exhibits, written and oral testimony, and data, describing why the authorized common equity ratio, authorized rate of return on equity, and/or prior rate period's average monthly rate of return on equity does not provide a fair and reasonable return;

(iii) describe with sufficient detail why the authorized common equity ratio, authorized rate of return on equity and/or prior rate period's average monthly rate of return on equity adopted by the commission is insufficient for the regulated utility to attract capital at reasonable terms; and

(iv) describe with sufficient detail why the authorized common equity ratio, authorized rate of return on equity, and/or prior rate period's average monthly rate of return on equity is insufficient for the regulated utility to maintain its financial integrity during the rate year.

(c) If the commission determines, by a preponderance of the evidence, after the conclusion of the public hearing, that the regulated utility has sufficiently demonstrated that the authorized common equity ratio, authorized rate of return on equity, and/or prior rate period's average monthly rate of return on equity is insufficient to meet the regulated utilities' operating needs, capital needs, or both, then the commission and the regulated utility shall then enter into settlement negotiations through adjudication pursuant to the procedures set out under this article.

5. Settlement negotiations following successful rebuttal. All settlement negotiations shall take into consideration the following factors prior to reaching a final authorized common equity ratio, authorized rate of return on equity, and/or prior rate period's average monthly rate of return on equity:

(a) testimonies and exhibits from expert witnesses, including those from outside public interest organizations;

(b) how the negotiated settlement reduces delivery rates for consumers;

(c) how the negotiated settlement improves equity for, minimizes impacts on, and prioritizes benefits to utility rates for disadvantaged communities as defined in section 75-0101 of the environmental conservation law;

(d) whether the testimony and exhibits of the regulated utility reflect positions that are in the best interest of the public and promote principles of equity for disadvantaged communities;

(e) whether the proposals of the regulated utility would result in the lowest possible delivery cost to the benefit of the rate payer; and

(f) whether the new settlement agreement provides a just and reasonable return for the regulated utility.

6. Reports and legislative hearing on findings between the commission and regulated utilities. (a) Annually, the commission shall publish a report outlining the findings and determinations of the final authorized common equity ratio, authorized rate of return on equity and/or prior rate period's average monthly rate of return on equity, whether set through the procedures outlined in subdivisions three and four of this section or through negotiated settlements outlined in subdivision five of this section, between a regulated utility and the commission during the previous year.

(b) Such report shall analyze and describe in clear, accessible language how the final authorized common equity ratio, authorized rate of return on equity, and/or prior rate period's average monthly rate of return on equity has changed, reflects new circumstances, or remained the same during the previous year.

(c) Such report shall include all monthly data used for generic financing methodology calculations that is not publicly available data, together with an explanation of why it was necessary to use such non-public data instead of a publicly available data source.

(d) The annual report shall be presented by the commission to the legislature, where legislators shall have the opportunity to issue information requests before, during, and after such hearing.

§ 3. This act shall take effect one year after it shall have become a law.