

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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.

Case 07-E-0523

BRIEF ON EXCEPTIONS
OF THE
NEW YORK STATE CONSUMER PROTECTION BOARD

Mindy A. Bockstein
Chairperson and Executive Director

Douglas W. Elfner
Director of Utility Intervention

John M. Walters
Intervenor Attorney

Dated: January 28, 2008
Albany, New York

NYS CONSUMER PROTECTION BOARD
5 EMPIRE STATE PLAZA
SUITE 2101
ALBANY, NY 12223-1556
www.nysconsumer.gov

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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.

Case 07-E-0523

BRIEF ON EXCEPTIONS
OF THE
NEW YORK STATE CONSUMER PROTECTION BOARD

The Consumer Protection Board ("CPB") has demonstrated throughout this proceeding that Consolidated Edison Company of New York Inc.'s ("Con Edison" or "Company") proposed \$1.2 billion rate increase should be reduced by at least \$600 million, additional investigation is required of approximately \$1.6 billion in capital spending and \$200 million in expenditures for environmental remediation before these costs can be charged to ratepayers, and that several changes are required to be made to the Company's energy efficiency and revenue decoupling proposals.¹ The Recommended Decision ("RD") by Administrative Law Judges ("ALJs") William Bouteiller, Michelle L. Phillips and Rudy Stegemoeller issued on January 8, 2008, reaches many of those same conclusions. Although the RD presents a thorough and thoughtful analysis of the contested issues and evidence in this case, it is the CPB's position that in several

¹ E.g., CPB Reply Brief ("RB"), December 14, 2007, p. 1.

areas, the RD does not fully consider the CPB's recommendations, is mistaken or unclear. Thus, our exceptions are directed at those issues.

World Trade Center Costs

The CPB recommended that the Public Service Commission ("PSC" or "Commission") maintain its current practice regarding the Company's recovery of the remaining costs to restore its facilities that were damaged as a result of the September 11, 2001 attack on the World Trade Center ("WTC"), as well as associated interest. Under this proposal, Con Edison would continue to recover the amount currently provided in rates (\$14 million annually), while the Company aggressively pursues cost recovery from insurance carriers, the federal government and other parties.²

The Judges reject the CPB's proposal and conclude that "the time has arrived" to recover the WTC-related costs that the Company has incurred, by building into rates, \$37.3 million.³ The CPB takes exception to this conclusion, since the RD does not properly consider consumer interests on this point. In particular, the RD recommends that the Commission adopt the Company's quantification of WTC-related costs and increase the recovery of those costs from ratepayers by 166% without taking into consideration the wide range of on-going activities that may affect the amount of such costs that should be paid by ratepayers. It does not consider the resolution of: (1) the Company's December

² CPB Initial Brief ("IB"), pp. 48 – 50.

³ RD, pp. 25 - 6.

2007 claim for reimbursement of more than \$100 million of costs under the federal reimbursement program, (2) the Company's appeal of a previous decision regarding reimbursement from the federal program and (3) pending litigation in which Con Edison is seeking recovery of a portion of the costs from other entities.⁴

In similar circumstances, the Commission had previously concluded:

Consideration of WTC-related expenses is premature because of the unsettled nature of such costs. Con Edison and the State of New York continue to pursue multiple avenues for recovery of those extraordinary costs, including, but not limited to, insurance claims, federal aid and other reimbursement programs...⁵

The factors that led the PSC to that conclusion in 2004, continue to be applicable today. However, the RD does not even attempt to distinguish today's circumstances from those that existed in 2004 and instead focuses only on the time that has elapsed since Con Edison incurred the WTC-related costs. The fact that resolution of the reimbursement, insurance and litigation issues has taken longer than the Judges consider to be reasonable, does not warrant changing the Commission's policy regarding recovery of WTC-related costs, which explicitly protects consumers because the nature of the costs is unsettled.

Moreover, the RD does not recognize the fact that the WTC-related costs for which the Judges would authorize recovery from ratepayers, have not been

⁴ CPB IB, p. 49.

⁵ Case 01-M-1958, Petition of Consolidated Edison Company of New York, Inc. for Permission to Defer Costs Related to Emergency Response and the Restoration of Service Related to the World Trade Center Disaster, filed in C 9187, Order, January 30, 2004, p. 3.

reviewed, examined or audited in any manner by DPS Staff or any other party in this proceeding. In fact, the record shows that auditors employed by the Empire State Development Corporation for purposes of determining amounts that are reimbursable from federal appropriations, have denied portions of the Company's reimbursement claims.⁶ This strongly suggests that, upon review, the PSC will conclude that portions of the amounts at issue should not be recovered from customers. The RD ignores this critical fact, and therefore would not prevent ratepayers from paying unwarranted costs.

The CPB recognizes that it has been many years since the Company incurred WTC-related costs. However, the Commission's ratemaking policies on this issue are fair to both ratepayers and the Company, since Con Edison continues to earn interest on amounts it is owed. In contrast, the approach recommended by the ALJs is not fair to ratepayers for the reasons explained above. Accordingly, the recovery from ratepayers of WTC-related costs should be limited to an amount that will not be recovered from other sources and has been fully reviewed and determined to be properly reimbursable by ratepayers. The record shows, however, that there is still substantial uncertainty regarding the former, and that the necessary review has not yet taken place. In these circumstances, the Commission should continue to permit the Company to recover \$14 million for these costs through delivery rates. It should also monitor Con Edison's activities to ensure that it aggressively pursues cost recovery from all relevant parties.

⁶ CPB IB, p. 49.

Variable Pay

The CPB proposed that the costs of Con Edison's variable pay program, totaling \$11.2 million, be disallowed, since, among other things, the Company had not demonstrated that the beneficiaries of the plan are ratepayers. Con Edison asserted that the plan benefits ratepayers by encouraging employees to perform at a higher level. In attempting to reconcile these different perspectives, the Judges appeared to support the CPB's position, stating:

it is unclear whether the variable pay plan is designed and intended to provide any specific and measurable cost saving and efficiencies that inure to the benefit of ratepayers. If this program is primarily intended to compensate employees for superior performance, there has not been any demonstration provided by Con Edison to show that the amount paid were, in fact, related to any specific results.⁷

Surprisingly, however, the Judges came to a contradictory conclusion, stating:

We find that the status of the variable pay plan has not been adequately developed on the record in this case to support the cost disallowance that CPB has proposed.⁸

The Judges appear convinced by Con Edison's statement that the plan is a "cost-effective substitute" for a merit pay plan.⁹ Both the CPB and the Company testified, however, that the variable pay program provides awards to management employees with satisfactory performance.¹⁰ A merit pay plan, in contrast, would provide awards only for performance that is over and above what

⁷ RD, p. 32.

⁸ Id.

⁹ Id.

¹⁰ CPB IB, p. 54.

is expected of an employee and which results in increased benefits to shareholders and ratepayers. Moreover, as the Judges found, there has been no showing that the variable pay program has produced any benefits for ratepayers.

As a result, Con Edison has not met its burden of proof as required by the Public Service Law ("PSL")¹¹ and the New York State Code of Rules and Regulations ("NYCRR").¹² Therefore, the Judges' conclusion that the absence of a demonstration of ratepayer benefits from the variable pay plan requires the program to be funded by customers, is erroneous and not supported by the evidence.¹³ Thus, it should be reversed by the Commission.

Group Life Insurance Costs

The CPB appreciates the Judges' acceptance of an adjustment to the Company's proposal on this issue, but respectfully requests that the Commission's decision in this case also credit the CPB for originating the proposal. The CPB testified that Con Edison's projection for group life insurance is unusual, excessive and ignores an anticipated dividend from the insurance provider. We recommended that the Company's proposal be reduced by approximately \$730,000 to reflect a dividend of the average received in the last five years.¹⁴ Staff of the Department of Public Service ("DPS Staff") did not submit testimony on this issue, but adopted the CPB's proposal in its IB without

¹¹ PSL §66(12)

¹² 16 NYCRR § 61.1.

¹³ RD, p. 32.

¹⁴ CPB IB, pp. 55 – 56.

explicitly indicating where it originated.¹⁵ The Judges accept the proposal in its entirety, but attribute it solely to DPS Staff,¹⁶ an oversight that the Commission should correct.

Director's and Officer's Liability Insurance

The CPB recommended that the cost of Director's and Officer's Liability ("D&O") Insurance be funded by shareholders instead of ratepayers since the program provides no direct benefit to customers.¹⁷ The Judges reject this proposal in a single sentence stating: "The standard practice is to allow such costs for ratemaking purposes and the Commission has not had a policy to the contrary."¹⁸

The CPB excepts to that conclusion. While the Commission may not have a policy disallowing such costs for ratemaking purposes, the RD did not identify, and the CPB is not aware of, a written PSC policy that explicitly requires the costs of D&O insurance to be paid by ratepayers. Moreover, even if such a policy exists, it is within the Commission's discretion to consider in a rate case, whether it should continue to be applicable, particularly in consideration of new facts and circumstances. The Judges erred in refusing to consider the issue and not even mentioning the new circumstances identified by CPB.

¹⁵ DPS Staff IB, pp. 33 – 35.

¹⁶ RD, pp. 34 – 35.

¹⁷ CPB IB, pp. 57 – 59.

¹⁸ RD, p. 41.

D&O insurance is designed to protect directors and officers from inappropriate activities and decisions that are adverse to shareholder interests. Ratepayers fund fair compensation for directors and officers including stock options,¹⁹ thus it would be unfair for ratepayers to pay again, to insulate these individuals for their personal responsibility for inappropriate decisions.²⁰

Ratepayer funding of this insurance is particularly inappropriate in these circumstances. The record shows that the cost of D&O insurance has increased significantly in recent years, and now represents 22.6% of the total cost of Con Edison's corporate insurance. This is a significant portion of Con Edison's total insurance costs for its plant and public liability. Further, Con Edison's claim that the increase in D&O insurance is outside of its control and determined by events that are not the fault of management, an assertion not challenged by the Judges,²¹ is unsupported. On the contrary, the Company has not shown that the increase in this expense in recent years was not attributable to the potential for findings of liability against its directors and officers associated with the prolonged power outages in 2006, the resulting lawsuits and the PSC's on-going prudence review of the appropriateness of the utility's actions. Similarly, Con Edison has not shown that the increase in this expense was not attributable to the July 2007 rupture of a steam pipe in which an individual perished and others were injured

¹⁹ RD, p. 29 – 31.

²⁰ The RD's explanation of the CPB's position on this point was not completely precise. The CPB does not dispute that officers and directors may "need to be insulated from personal responsibility for inappropriate decisions." (RD, p. 41) The Agency's position is that shareholders, not ratepayers, should fund that insurance.

²¹ RD, p. 41.

and the Commission is currently assessing whether a proceeding should be initiated to determine whether the Company was imprudent. Con Edison has the burden of proving that the increase to its D&O insurance cost is not the fault of management, and its unsupported claims on this matter are illogical. The PSC should ensure that Con Edison's customers are not required to fund higher D&O insurance premiums attributable to the actions and inactions of Company officers associated with those events. Accordingly, the CPB recommends that the Commission establish rates based on a level of D&O insurance expense that is no greater than before 2006.

Site Investigation and Remediation

Con Edison projects total site investigation and remediation ("SIR") costs for the period April 2007 – March 2009, of \$134.5 million for its electric operations. If amortized over three years, approximately \$45 million of SIR costs would be included in rates established in this proceeding, a 436% increase from the \$8.4 million included in the Company's current rates.

Con Edison has no financial incentive to ensure that SIR projects are implemented in a cost-effective manner, since 100% of reasonable SIR costs are to be paid by ratepayers. Given the magnitude of the increase, a thorough review of those costs is required, therefore, to determine if they were reasonably incurred and should be paid by customers. The record shows that no such examination has been conducted. In particular, there has been no examination of: (1) the reasonableness of the Company's SIR cost estimates with the

exception of the timing of certain projects, (2) deviations of actual SIR costs from estimates, (3) Con Edison's procedures for bidding for site remediation work, (4) the competitiveness of the bidding process, and (5) the adequacy of the Company's management of SIR projects to minimize overall costs.²² Accordingly, the CPB recommended that recovery of these costs from customers commence only if the Commission concludes that it is subject to reconciliation pending the results of the required review.

The Judges reject our recommendation, stating that "reconciliation mechanisms are generally undesirable for expense items in the context of a one-year rate plan."²³ That concern misses the point. The "reconciliation" mechanisms to which the Judges refer are designed to "true up" the amount provided in rates, with actual expenses. The "reconciliation" the CPB proposes, is between the amount to be provided in rates, and the amount for which ratepayers should be responsible, as determined by the review of SIR expenses that we recommend. Ratepayers require that protection, because actual SIR expenses have not been properly reviewed.

As to the CPB's recommendation that the required review of SIR expenses be conducted as part of the management audit, the RD concludes only that a management audit "could" include this issue.²⁴ Regardless of the forum or timing of the review, it is imperative that Con Edison not be permitted to recover

²² CPB IB, p. 47.

²³ RD, p. 43.

²⁴ Id.

costs that have not been subject to review, absent a mechanism to protect ratepayers in the event that the investigation determines that ratepayers should not fund the entire amount of Company expenditures. It is noteworthy that in considering a similar issue involving the recovery of \$1.6 billion in capital expenditures from the current rate plan, the Judges concluded: “we lack confidence in the record” supporting the evaluation of these expenditures, and therefore “recommend that a portion of the Company’s revenues be awarded on a temporary basis.”²⁵ This conclusion applies with equal force to SIR costs.

Interference Costs

The CPB proposed that the rate year estimate for interference costs be set at \$78 million, based on the ratio of actual expenditures to budgeted amounts in the test year. The Company and DPS Staff support an estimate of \$93 million.²⁶ The Judges conclude that “the reasonable range for this expense is based on the \$78 million proposed by CPB and the \$93 million that the Company and Staff support.”²⁷ Regarding the Con Edison/DPS Staff estimate, the ALJs find that it is “the best that the two parties can support and it is not the lowest reasonable estimate that could be used for ratemaking purposes.” Nevertheless,

²⁵ RD, p 105.

²⁶ We note, however, that the DPS Staff proposal was part of a broader proposal which included reconciliation of amounts below this level. (RD, p. 45) The CPB also recommended that shortfalls of actual to budgeted expenditures be reconciled to protect ratepayers in consideration of the large projected increase in interference expenditures. The Judges declined to adopt that recommendation.

²⁷ RD, p. 47.

the Judges conclude “Absent a demonstration by CPB that its estimate is more reasonable, we recommend that the Staff/Company estimate be used.”²⁸

The CPB’s estimate is derived by adjusting Con Edison’s original projection of \$104.98 million, which was developed based on a formula and information regarding the City of New York’s planned capital expenditures, to reflect the difference between actual and budget data in 2006. In that year, actual costs were only 74.2% of the amount budgeted. The CPB’s proposal is 74.2% of \$104.98 million, or \$77.9 million.

This estimate is more reasonable than the Company/DPS Staff proposal for several reasons. First, it is based on the methodology that is the foundation for most revenue requirement projections under PSC ratemaking practices. In particular, this method uses actual data in the test year, such as the 74.2% ratio of actual-to-budgeted expenses, adjusted for known changes, namely, the most recent projection of interference expense using information from the City of New York. Second, it relies on data from the period of time, 2006, that is most similar to the rate year. In both cases, a very large increase in interference costs is projected. In 2006, the amount budgeted for interference costs was approximately 22% higher than the average for 2002 – 2005, a period in which the level of these costs was stable. Since a large increase in interference expenditures is projected for the rate year, it is reasonable to use data on the ratio of actual-to-budget expenditures from the time period in which a similar

²⁸

Id.

large increase was projected, namely, 2006. Finally, the CPB's proposal is reasonable in that it would provide for a substantial increase in interference costs from the test year of \$24 million (44%).²⁹

For all of these reasons, the CPB's proposal is more justifiable than that provided by the DPS Staff/Company, and should be adopted by the Commission.

Normalizing Adjustment for Labor Expense

Con Edison proposed a normalizing adjustment of \$3.372 million to its forecast of labor expense, to reflect positions filled during the year for which a full year of compensation is not included in the historical data, as well as compensation for positions that were vacant at the end of the test year. The CPB identified several concerns with that proposal, as explained below, and recommended that the majority of it be disallowed, thereby reducing the Company's projection by \$2.46 million.³⁰ The Judges do not address this matter in the RD.

The CPB recommends that the Commission review this issue and adopt our proposal. The Company's normalization adjustment to add expenses to test year data is one-sided, since it does not remove funding for employees that left during the test year or for vacancies that will occur in the rate year. Con Edison asserts that these issues are properly addressed in the Company's forecast,

²⁹ Test year interference costs were \$53.975 million. The Company's insistence on comparing its rate year proposal of \$93 million with test year data that are augmented to include WTC-related costs of \$17.98 million, is unreasonable. The record contains no evidence that the Company is expected to incur comparable WTC-related interference costs in the rate year. Thus, the proper point of comparison is \$53.975 million of interference expenditures in the test year.

³⁰ CPB IB, pp. 50 – 51, citing TR 1407; 1533.

since it “reflects a vacancy factor.” However, the Company could not identify the duration of vacancies encompassed in that factor, nor explain how it prevents ratepayers from funding positions that are unfilled for an extended period of time and/or positions that are unfilled at the commencement of the rate year.³¹ For these reasons, the CPB continues to recommend that the Commission disallow the full amount of the normalization adjustment, with the exception of 75% of the requested adjustment for shared services and finance. Thus, our proposal would reduce the Company’s labor expense projection by \$2.46 million.

Storms Expense

Con Edison proposed that rates include \$8 million to fund storm costs. The CPB recommended that \$5 million be included in rates for this purpose. The Agency’s proposal is based on expected annual costs of \$1.1 million for one “level 3A” storm every two years, \$1.5 million for “level 2” storms and storm mobilization costs of \$2.4 million. Since the remaining “level 3” storms have historically occurred approximately once every three years, we recommended that the costs of those storms not be built into rates, but that they be addressed in a deferral request.³²

The Judges conclude: “[w]e find the CPB’s arguments persuasive.”³³ However, they recommend that the Company establish a storm reserve in the

³¹ Id.

³² CPB IB, pp. 84 – 86.

³³ RD, p. 72.

amount of \$5.6 million, rather than the \$5.0 million proposed by CPB. It appears that this quantification is a typographical error, since the RD does not indicate even a hint of concern or disagreement with the CPB's proposal and quantification. Therefore, the Commission should clarify that the rates should include \$5.0 million for a storm reserve.

Mobile Stray Voltage

Con Edison projected \$10.883 million in costs for the mobile stray voltage testing program, an increase of \$7.43 million over the test year. The CPB recommended that this estimate be reduced by \$1.883 million.³⁴ The RD contains no mention of this recommendation. Instead, it adopted the proposal by DPS Staff to require the Company to submit reports regarding the reasonableness of the expenses of this program.³⁵

The CPB urges the Commission to augment the DPS Staff recommendation under which the Company would file reports, with our proposal of \$9 million for this project, the same level as budgeted for 2007. This would represent an increase of approximately 260% over costs in the test year. Our proposed adjustment of \$1.883 million is reasonable because of concerns regarding the high level of standby costs associated with mobile stray voltage testing, as noted by the CPB and the Judges.³⁶ Standby costs-per-detection

³⁴ CPB IB, pp. 69 – 70.

³⁵ RD, p. 73.

³⁶ CPB IB, p. 70; RD, p. 73.

have tripled in only one year without explanation, and it is reasonable to expect that as the volume of testing increases, the electric system will improve, thereby reducing mobile stray voltage testing costs in the future.

Electric Operations O&M Programs

Based on a thorough analysis of Con Edison's proposals to substantially increase spending on operations and maintenance ("O&M") projects for its electric division, the CPB found that in many cases, the Company's projections are unsupported and grossly inconsistent with activity in the test year. Accordingly, the Agency recommended adjustments to the Company's proposals.

The Judges reject several of our proposals, finding that "CPB's argument that Con Edison was not responsive to discovery requests" does not warrant approval of the Agency's recommendations.³⁷ We find exception regarding the following two issues.

Five-Year Overhead Inspection Program

The CPB recommended that Con Edison's proposed increase of \$5.443 million for overhead pole inspections be reduced by one-half.³⁸ The Judges

³⁷ RD, pp. 77 – 78.

³⁸ CPB IB, pp. 66 – 67.

stated that the CPB's proposal is based on the Agency's view that Con Edison was not responsive to discovery requests.³⁹ That characterization is incorrect.

As fully explained in the CPB's Initial Brief, our proposed adjustment is based on the fact that the Company's projected spending in the rate year is grossly inconsistent with its historical spending. The Company incurred no costs for overhead inspections in the test year, and none in 2007, yet it proposes \$5.443 million of such costs in the rate year. Our proposed adjustment is based on the fact that it is unfair to ratepayers for the Company to defer inspections until it can obtain explicit recovery of an anomalously high level of costs through a rate case decision. Since the Company made no expenditures on this program in 2006 and 2007, it clearly considers this project to be discretionary. This fact alone warrants approval of the CPB's proposal, particularly in consideration of the size of the rate increase being considered in this proceeding.

The CPB also pointed out that the Company did not adequately explain its proposal to increase spending on this project in its direct testimony, exhibits, workpapers, response to information requests and/or rebuttal testimony. The Judges incorrectly confuse the absence of any explanation or support for rate year expenditures that far exceed historical spending, with a discovery dispute. The Company did not decline to answer the CPB's discovery requests on this point. Instead, the Company simply failed to provide the information required for it to support its proposal and meet its burden of proof, despite numerous opportunities through discovery and testimony.

³⁹ RD, pp. 77 – 78.

In view of the discretionary nature of this project and the absence of supporting information, the CPB's proposal to reduce by \$2.721 million, the Company's projected increase for overhead pole inspections, is reasonable and should be adopted.

Network Transformer Vault Cleaning

The CPB recommended that the costs of Con Edison's new network transformer vault cleaning program of \$5.488 million be reduced by \$2.366 million. The Judges incorrectly state that the CPB's proposal is based on the Agency's view that Con Edison was not responsive to discovery requests.⁴⁰ The CPB takes exception to that finding.

As fully explained in the CPB's Initial Brief, the CPB's proposal is warranted because: (1) the Company itself stated that the network transformer vault cleaning project is the least important of all programs in its "public safety and environmental program" list, (2) Con Edison could only identify components totaling \$4.357 million of the project's \$5.488 million total cost, and (3) the Company did not even attempt to respond in its rebuttal testimony to the CPB's concerns and recommendation.⁴¹ The Judges erred in characterizing the CPB's rationale as a discovery dispute, and not considering the Agency's substantive concerns as identified above.

⁴⁰ RD, pp. 77 – 78.

⁴¹ CPB IB, pp. 70 – 71.

Notably, in addressing another proposal regarding the O&M budget relating to infrastructure, the Judges cited the importance of “specific evidence of programs that are unnecessary.”⁴² The record shows that even the Company does not view this as a high or medium priority. Given these circumstances, we urge the Commission to adopt the CPB’s recommendation and provide funding for the Company to phase in this program, by reducing the costs to be recovered from ratepayers by \$2.366 million.

System and Transmission O&M Programs

Con Edison requested an increase in system and transmission O&M expenses of \$7.375 million from spending in the test year. In our direct testimony, the CPB recommended that this projection be reduced by \$3.798 million, due to the absence of supporting information. Based on new information provided in the Company’s rebuttal testimony, we revised our proposal in our Initial Brief. The CPB continued to recommend that funding not be provided for the “new EMS system license” and “improve OH restoration capability” programs because of the absence of supporting information.⁴³

The Judges reject our proposal, saying that CPB did not exhaust its remedies to obtain additional information in the discovery process.⁴⁴ We request that the Commission review that conclusion.

⁴² RD, p. 74.

⁴³ CPB IB, pp. 61 – 62.

⁴⁴ RD, pp. 77 – 78.

The Company's direct testimony and workpapers did not contain supporting information for six projects in this category. After issuing several discovery requests and reviewing the responses, the CPB recommended that funding for four of the requested projects not be provided, and reduced funding be provided for two others. In its rebuttal testimony, the Company supplied, for the first time, some of the information that the CPB had requested. However, Con Edison did not even mention the "new EMS system license" and "improve OH restoration capability" projects in its rebuttal testimony. The fact that Con Edison was unable or unwilling to produce even the most basic supporting detail for these projects in its rebuttal testimony, demonstrates that the Company's request was nothing more than a wish list.

For these two projects, the Company did not meet its burden of proof as required by the PSL⁴⁵ and the NYCRR,⁴⁶ despite numerous opportunities. Thus, the Judges erred in concluding that this was solely a discovery dispute. For these reasons, we recommend that the Commission deny the Company's request that ratepayers fund for the "New EMS System License" and "Improve OH Restoration Capability" programs, thus reducing projected expenses by \$1.4 million.⁴⁷

⁴⁵ PSL §66(12)

⁴⁶ 16 NYCRR § 61.1.

⁴⁷ Calculated from Exhibit 125, Schedule 5, page 2.

Steam Operations

The CPB proposed several changes to the Company's projections of expenses for its steam operations, including that the Company's forecast of additional gas turbine maintenance be rejected since it is far out of line with historical expenditures, and its proposed facilities maintenance expenditures be reduced to match average spending in the last three years.⁴⁸

The Judges decline to evaluate the merits of these recommendations. Instead, they reject them summarily, stating "the Company has demonstrated a sufficient record basis for adoption of its proposed spending levels."⁴⁹ The CPB takes exception to that conclusion.

We urge the Commission to evaluate the merit of the record evidence cited by the CPB. Regarding gas turbine maintenance for steam operations, the record shows that the Company completes required maintenance of the gas turbine equipment at its generation stations in a three-year cycle. Con Edison spent an average of \$431,000 per year on this maintenance, and the most it ever spent on this activity was \$726,000, in 2006. However, it proposed to spend \$2.97 million for this purpose in the rate year, an increase of \$2.244 million (309%). Neither the record, nor the RD, contains any explanation as to why an increase of this magnitude is warranted. Accordingly, the CPB recommends that the proposed \$2.244 million of incremental spending be rejected.

⁴⁸ CPB IB, pp. 79 – 81.

⁴⁹ RD, p. 80. The Judges recommended approval of the vast majority of the Company's projected increase of \$7.162 million in steam expenses. The ALJs recommended only that projected water expense be reduced by \$35,000.

With respect to facilities maintenance, Con Edison projects that it will spend \$4.248 million in the rate year, an increase of \$3.2 million. The Company spent an average of \$2.976 million per year for this maintenance in the years 2004 – 2006, and budgeted just \$1.487 million for these costs in 2007. The RD contains no explanation as to why it is in the public interest for the Commission to approve the large increase proposed by the Company. The CPB proposes that the Company's projection be replaced with average spending in the 2004 – 2006 period, thereby reducing Con Edison's estimate by \$1.272 million.

Capital Expenditures, Audit and Temporary Rates

The adequacy of the investigation of the Company's transmission and distribution ("T&D") capital expenditures, including those made under the current rate plan and projected for the rate year, as well as the extent to which ratepayers should be required to pay for those projects at this time, were vigorously contested in this proceeding. In the face of strong disagreements regarding these issues of critical importance to consumers, the ALJs crafted an extremely balanced and statesmanlike solution. They concluded that further scrutiny of the expenditures is warranted, and the Company should be permitted to begin to recover certain amounts, but

a portion of the revenue requirement associated with the Company's capital program be authorized in the form of temporary rates, subject to refund pending the results of a management and operations audit.⁵⁰

⁵⁰ RD. p. 112.

This approach is fair to both consumers and the Company, and enables the Commission to move forward into a new era in which expenditures, particularly those for which the utility has no incentive to conduct in a cost-effective manner such as the T&D capital expenditures at issue here,⁵¹ are scrutinized in an open and transparent process.

The CPB fully supports this finding, but seeks clarification of several statements in the RD that do not effect this overall recommendation. First, the Judges state that the record shows that “the individual components of the Company’s construction program are necessary, and that their costs are reasonable.”⁵² This sentence, standing alone, is contrary to numerous findings by the ALJs regarding the need for further investigation of Con Edison’s historic and planned capital expenditures. It is also inconsistent with the Judges’ finding that the approach of analyzing certain individual components of the Company’s capital expenditures should be rejected in favor of a percentage reduction in Con Edison’s total capital budget,⁵³ and cannot be reconciled with the fact that the vast majority of DPS Staff’s analysis of project costs was based only an analysis of historic spending levels and did not consider any other measure of reasonableness.⁵⁴ Further, the CPB explained in detail that the costs of Con Edison’s capital projects have not been adequately examined.⁵⁵ DPS Staff also

⁵¹ SIR costs are another issue to be investigated in this manner, as explained above.

⁵² RD, p. 111 – 112.

⁵³ Id., p. 96.

⁵⁴ Id., p. 88.

⁵⁵ CPB IB, p. 17 – 19.

identified several concerns with the Company's projections of the costs of its capital projects, including the fact that the Company did not assess the costs of completing projects in-house versus by a contractor.⁵⁶ Further, DPS Staff concluded that "a closer scrutiny of the Company's T&D capital expenditures, including all proposed projects and programs can be justified."⁵⁷ The single sentence cited above appears to be inconsistent with the remainder of the RD. Thus, the Commission should ensure that it is not taken out of context by parties opposing closer scrutiny of the Company's capital expenditures.

Second, the RD addresses a concern raised only by the CPB, that many of the Company's capital projects might be rendered obsolete by technological developments such as third generation architecture for substations.⁵⁸ The Judges acknowledge the tension between building immediately to address system needs, and recognizing that the new construction might not be able to accommodate advanced technologies. They conclude that the record is insufficient in this proceeding to evaluate whether the Company is achieving a reasonable balance of those goals at this time, and recommend that "this issue be addressed in greater detail in a subsequent proceeding."⁵⁹ The CPB asks the Commission to clarify that the issue will be pursued immediately upon completion of the management and operations audit of Con Edison. The Company's

⁵⁶ DPS Staff IB, p. 170 – 171.

⁵⁷ Id., p. 169.

⁵⁸ CPB IB, p. 15.

⁵⁹ RD, p. 115.

planned capital expenditures of approximately \$2 billion per year, the fact that significant technological advances in the delivery of electricity are on the horizon, and the powerful financial incentive that Con Edison has to invest more than is necessary to provide safe and reliable service, require that the Commission explicitly consider these issues as soon as possible to avoid requiring ratepayers to pay for capital projects that will shortly be rendered worthless.

Finally, the RD adopts a proposal set forth by DPS Staff and the CPB to protect consumers in the event that the Company's T&D capital expenditures are less than the amounts reflected in rates, by deferring any such shortfall as a ratepayer credit.⁶⁰ The Judges inadvertently, however, credited the proposal solely to DPS Staff, ignoring the CPB's advocacy of this proposal throughout this proceeding.⁶¹ Therefore, we respectfully request that the Commission's order in this proceeding be amended to acknowledge the CPB's contribution to this proposal.

⁶⁰ Id., p. 115 – 116.

⁶¹ CPB IB, p. 21.

CONCLUSION

With the modifications and clarifications we identify herein, the Recommended Decision of the ALJs in this proceeding should be adopted by the Commission.

Respectfully submitted,



Mindy A. Bockstein
Chairperson and Executive Director

Douglas W. Elfner
Director of Utility Intervention

John M. Walters
Utility Intervenor Attorney

Dated: January 28, 2008
Albany, New York

