

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

THE NEW YORK STATE CONSUMER PROTECTION BOARD'S  
BRIEF OPPOSING EXCEPTIONS

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On January 8, 2008, Administrative Law Judges ("ALJs") William Bouteiller, Michelle L. Phillips and Rudy Stegemoeller issued a Recommended Decision ("RD") in this proceeding. The Judges urged the Public Service Commission ("PSC" or "Commission") to adopt many of the recommendations made by the Consumer Protection Board ("CPB"), including that Consolidated Edison Company of New York Inc.'s ("Con Edison" or "Company") proposed \$1.2 billion rate increase be reduced by at least \$600 million, approximately \$1.6 billion in capital spending be investigated before it can be charged to ratepayers, and several changes be made to the Company's energy efficiency and revenue decoupling proposals. On January 28, 2008, Briefs on Exception ("BOE") were filed by the CPB, as well as Con Edison; Staff of the Department of Public Service ("DPS Staff"); jointly by the City of New York, the Metropolitan Transportation Authority and the Port Authority of New York and New Jersey ("NYC Government Customers"); the County of Westchester; the New York City Council; the New York State Energy Research and Development Authority

("NYSERDA"); the New York Power Authority; the Natural Resources Defense Council and Pace Energy Project ("NRDC/Pace"); the New York Energy Consumers Council, Inc.; Utility Workers Union of American, AFL-CIO, Local 1-2 ("Local 1-2"); Consumer Power Advocates; the Retail Energy Supply Association; Reliant Energy, Inc., ARE-East River Science Park, LLC, and a coalition of demand response program providers referred to as Joint Supporters.

In this brief, the CPB submits its opposition to certain exceptions made by other parties. The absence of any specific opposition in this brief to an exception should not be construed as support for that position. Instead, it reflects the CPB's view that no further discussion is required or that we expect the matter to be adequately addressed by other parties. Issues are addressed in the order presented in Con Edison's BOE.

## I. REVENUE DECOUPLING

The Judges conclude that new energy efficiency programs such as those proposed by Con Edison, should not be implemented at this time, since energy efficiency policy issues are being considered generically in another proceeding. Instead, they recommend continuation of the current "targeted" energy efficiency program administered by Con Edison under which energy efficiency reductions are focused on specific geographic areas to permit postponement of additional capital expenditures. (RD, p. 171) The Judges also recommend continuation of the system-wide efficiency program managed by NYSERDA, and found that a

revenue decoupling mechanism (“RDM”) should be implemented effective April 1, 2008. (Id., pp. 7 – 14)

Con Edison asserts that the Judges erred in requiring an RDM at this time. It states that decoupling should be postponed if the Commission “delays consideration of the energy efficiency issue,” and that an RDM mechanism should not be adopted for Con Edison if the PSC determines that “the Company should not have a central role in promoting energy efficiency.” (Con Edison BOE, p. 4)

The CPB disagrees with Con Edison’s assertion. An RDM should be in place at the beginning of the rate year. Without such a mechanism, Con Edison would have the incentive and opportunity to take action that is contrary to the State’s energy efficiency goals. Such action would diminish the value of consumer expenditures on energy efficiency, including funds for the targeted and system-wide programs that the Judges recommend be continued, as well as the System Benefits Charge which supports NYSERDA’s programs. In the absence of an RDM, Con Edison would have an incentive to take action to undercut the benefit of these ratepayer-funded programs, thereby jeopardizing consumers’ acceptance of ratepayer-funded demand-side management activities. It is particularly important that an RDM be in place since the Commission is expected to issue a decision in the generic energy efficiency case in the next several months under which ratepayers are likely to be required to provide additional funding for energy efficiency programs.

Overall, Con Edison's exception should be denied. The PSC should take action to ensure that an RDM is in place by April 1, 2008, as recommended by the Judges.

## II. SITE INVESTIGATION AND REMEDIATION COSTS

Con Edison and DPS Staff project \$126 million of site investigation and remediation ("SIR") costs for the Company's electric operations in the rate year. The Judges accepted this estimate and recommended that it be recovered by the Company over five years. They also stated that the amount to be included in rates, \$25.2 million, should not be "reconciled" with the actual level of SIR costs. (RD, p. 43)

Several parties take exception to the Judges' recommendation on the grounds that the absence of a reconciliation mechanism would expose the Company to the risk that it may not be able to recover prudent SIR costs, and may therefore discourage its remediation efforts. (CE BOE, pp. 19 - 21; NYC Government Customers BOE, pp. 45 - 47) These parties recommend that the Commission modify the RD to include a mechanism that would permit the Company to recover actual SIR expenses exceeding the \$126 million currently projected.

As previously explained, the CPB fully supports the need to investigate and remediate sites in accordance with directives of the New York State Department of Environmental Conservation ("DEC"). The Commission should ensure that the Company does not have any financial incentive to postpone or

avoid environmental efforts approved by the DEC. Accordingly, we support the proposal to reconcile the \$126 million of projected SIR costs, with actual SIR expenditures, as long as the actual expenditures are reviewed to determine whether they should be recovered from ratepayers.

The investigation of actual SIR costs is necessary since a thorough review of the projected costs has not been conducted, Con Edison has no financial incentive to implement SIR projects in a cost-effective manner and projected costs are much higher than the \$8.4 million included in the Company's current rates. Accordingly, the Commission should establish a mechanism to protect ratepayers in the event that the investigation we recommend, concludes that ratepayers should not fund the entire amount of Con Edison's SIR expenditures. (CPB BOE, pp. 43 - 47)

Con Edison also opposes the Judges' conclusion that projected SIR costs are to be recovered over five years, and instead asserts that the Company should be permitted to recover the full \$126 million of SIR costs in the rate year. (CE BOE, p. 22) This would increase the amount of the rate increase by approximately \$100 million. The Company's assertion should be rejected. The five-year recovery period recommended by the ALJs is eminently reasonable since it fairly balances the need for the Company to recovery those costs with concerns about the impact of the resulting rate increase on consumers.

### III. UNDERGROUND INSPECTIONS

Con Edison projected rate year costs of \$35 million for its underground inspection program, based on a forecast of 75,447 inspections at an average cost of \$463.92. The CPB demonstrated that the Company's projection was overstated by \$19 million, since Con Edison had testified that 50,000 inspections would be conducted, and the record indicates that the cost per inspection is \$319. The Judges agree with the CPB's projection of the costs per inspection, and adopted a forecast of 60,000 inspections. Overall, the ALJs recommend that the Company's projected cost of this program be reduced by \$16 million. (RD, pp. 74 – 76)

Con Edison asks the Commission to reject that recommendation, saying that the Company will conduct 75,447 inspections in the rate year and that new information indicates that the cost per inspection is \$363. The Company's assertion regarding the number of inspections contradicts explicit testimony by its own expert witness that "an incremental 50,000 inspections are required to meet the requirement of approximately 275,000 underground structures to be inspected." (TR 1972) In view of Con Edison's own testimony, there is basis in the record for the Commission to adopt Con Edison's new projection. Further, in providing funding for 60,000 inspections, the Judges already went beyond the evidence in the record in an effort to ensure that Con Edison has adequate funding to provide safe and reliable service.

Regarding the costs per inspection, the Company cites "additional information," which it asserts support its new estimate of \$363 per inspection.



Con Edison does not include the new information to which it refers, nor does it explain how that data supports its new cost estimate. More importantly, the Company's attempt to provide a new estimate of costs per inspection at this time, plainly violates the Commission's Statement of Policy on Test Periods in Major Rate Proceedings,<sup>1</sup> which as cited by Con Edison regarding other issues, "permits revisions for changes in estimates to be presented no later than the hearing at which Staff's direct case is cross-examined." (Con Edison BOE, p. 33, footnote 41; p. 41, footnote 49) That hearing began October 24, 2007. Thus, the "new estimate" in the Company's January 28, 2008 brief should be ignored by the Commission.

For these reasons, Con Edison's exceptions regarding the number of underground inspections to be conducted in the rate year, as well as the cost per inspection, should be denied.

#### IV. LINE CLEARANCE EXPENDITURES

Con Edison is taking steps to increase clearances between trees and poles, and recommended that it be provided \$13.755 million for this project in the rate year, an increase of \$7.995 million. The CPB proposed that rates be set to reflect the average of expenditures on this program for the last three years, or \$8.025 million.<sup>2</sup> The Judges state:

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<sup>1</sup> 17 NY PSC 25-R, November 23, 1977. ("Policy on Test Period Data")

<sup>2</sup> The CPB's proposal is conservative, since it reflects the Company's representation that it spent \$10.092 million on this program in 2006, despite information in its filing that indicates that it spent only \$5.76 million in that year. This discrepancy was noted in the CPB's Initial Brief (CPB IB, p. 71) and in the RD (p. 76), and has still not been explained by the Company.

In the absence of any Company rebuttal of CPB's adjustment, we recommend the Company's rate year allowance for this program be limited to the \$9.5 million estimated for 2007, adjusted for inflation. (RD, pp. 76 – 77)

Con Edison takes exception, and urges the Commission to provide it funding of \$13.5 million, which it asserts is the amount it actually spent in 2007.

The CPB opposes the Company's proposal. There is a sufficient basis in the record for the Commission to adopt the CPB's recommendation of \$8.025 million or the Judges' recommendation of \$9.5 million. The Company had ample opportunity to submit testimony in opposition to the CPB's recommendation, but as recognized by the Judges, it did not. Its new post-record estimate of rate year spending is in violation of the PSC's Policy on Test Period Data, and should not be considered by the Commission.

Notwithstanding our recommendation, if the Commission is inclined to provide more than \$9.5 million of ratepayer funding for line clearance in the rate year, it should ensure that ratepayers receive the benefit of any shortfall of actual spending on this project. The recent large increase in spending on this project, as well as unresolved questions over the amount of actual spending in 2006 (RD, p. 76), casts substantial doubt on the Company's contention that it will actually spend \$13.5 million on this project in the rate year. Ratepayers should be protected in view of this uncertainty.

#### V. DOUBLE WOOD POLES

Con Edison requested that ratepayers fund a 489% increase in the cost of its double wood pole program, to \$5.235 million. The CPB proposed that no

funding be provided for this project, since the Company did not explain why it is necessary for expenditures to skyrocket in the rate year and did not present a coherent or supportable basis for its proposed spending. (CPB IB, pp. 72 – 74) The Judges note in 2004 – 2006, the Company spent \$0, \$951,000, and \$889,000 on this project, respectively. The ALJs also found that Con Edison budgeted \$900,000 for this program in 2007, that the Company did not rebut the CPB's proposal and that it did not identify any reasons for accelerating spending on this program. Accordingly, they recommend an allowance of \$1 million for the program. (RD, p. 77)

The Company challenges the Judges' recommendation on several grounds, each of which is without merit. First, it asserts that the Judges incorrectly concluded that the program is not a priority for the Company. (Con Edison BOE, p. 32) However, in comparison to the projected expense of \$5.235 million, the level of expenditures for this program in recent years, averaging just over \$600,000 in 2004 – 2006, speaks for itself.

Second, the Company alleges that the historical data on which the Judges relied, was for Bronx and Westchester only. (Id., footnote 40) That assertion was not accompanied by any citation to the record, because in fact, the record shows otherwise. The source for each of the numbers cited by the Judges is the response to CPB Information Request 5, included in Exhibit 215. That question sought data on the Company's expenditures on the double wood pole program in 2004 – 2006, as well as its projection for 2007. Neither the question, nor the

response, even suggests that the data provided were for only a portion of Con Edison's operations.<sup>3</sup>

Third, Con Edison says that the RD did not properly consider the fact that the City of Peekskill instituted fines for not removing double wood poles, and that providing only \$1 million in funding for this program would subject the Company to penalties. (Con Edison BOE, pp. 32 – 33) However, the City of Peekskill instituted those fines in 2005. The \$1 million rate allowance recommended by the Judges is greater than the amount Con Edison spent on this program in 2005 and 2006, during which it was subject to fines by this municipality.

Finally, the Company alleges that its actual spending on this program in 2007 increased far beyond spending in recent years and that this higher level of expenditures should serve as the new estimate for the rate year. Again, the Company is seeking to circumvent the PSC's Policy on Test Period Data, by providing post-record information and a new estimate. The Commission should not countenance this attempt, which is in the nature of an unauthorized update and clearly violates the PSC's Policy.<sup>4</sup>

For all these reasons, the Commission should reject Con Edison's proposal regarding funding for the double wood pole program and affirm the RD.

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<sup>3</sup> Of course it is possible that the Company spent nothing on the double wood program in 2004 – 2006 in boroughs other than Bronx and Westchester. If that is indeed the case, it further demonstrates that the double wood program is not a priority.

<sup>4</sup> Throughout this proceeding, the Company has been unable to present consistent data on this matter, as noted in the CPB's IB (p. 73) and the RD (p. 77). This problem continues in Con Edison's BOE, which states on page 32, that the Company spent \$4 million on the double wood program in 2007, yet on page 33, it asserts that expenditures were \$5.235 million.

## VI. GENERALIZED ADJUSTMENT TO CAPITAL TRANSMISSION AND DISTRIBUTION EXPENDITURES

The amount of ratepayer funding that should be provided for rate year transmission and distribution (“T&D”) expenditures is one of the most contentious issues in this case. The record includes the Company’s detailed presentation on each major project, DPS Staff’s proposed program-level adjustments based primarily on the historical level of spending, and generalized adjustments proposed by the CPB and NYC Government Customers. The Judges considered the complete record and conclude that an overall 8% adjustment should be made to the Company’s projected rate year T&D capital expenditures. (RD, p. 97) The Company asks the Commission to reject that recommendation, on the grounds that it is arbitrary. (Con Edison IB, pp. 37 – 41)

Con Edison’s assertion is without merit. The RD clearly explains that the 8% adjustment is based on a consideration of all record evidence, including the Company’s project-level proposals. Ten full pages of the RD are devoted to a summary and analysis of those aspects of the Company’s proposed T&D capital expenditures over which there was disagreement. (RD, pp. 88 – 97) In these sections, the Judges painstakingly present and evaluate the positions of the parties in a fair and balanced manner. Overall, they conclude that several of DPS Staff’s project-level adjustments should be rejected or revised. This served as the foundation for the ALJ’s recommendation that an overall reduction of 8% be applied to the T&D capital budget.<sup>5</sup>

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<sup>5</sup> The Judges also stated that their recommendation is preliminary, conditioned on their proposals regarding an audit and temporary rates. (Id.)

Further, the Judges clearly explain why an overall percentage reduction is preferable to strict project-by-project adjustments in these circumstances. They correctly highlight concerns with the historical analysis underlying the project-level adjustments and show that it may not lead to accurate predictions. The ALJs also demonstrate that an overall percentage reduction is preferred since it would not discourage the Company from undertaking any particular project. (RD, p. 96) Thus, contrary to Con Edison's assertions, there is a substantial and reasoned basis for the Judges' recommendation.

For these reasons, the Commission should affirm the RD's generalized adjustment to the Company's T&D capital expenditure forecast.

## VII. TWO-WAY RECONCILIATION OF T&D CAPITAL EXPENDITURES

The Judges recommend approval of the one-way reconciliation mechanism of T&D capital expenditures proposed by CPB and DPS Staff, under which ratepayers would receive the benefit of any shortfall of actual T&D capital expenditures from those used to establish Con Edison's delivery rates in this proceeding. (RD, pp. 115 – 116) Con Edison asks the Commission to establish a two-way reconciliation of the Company's T&D infrastructure expenditures, "at least to the level of the Company's forecast expenditures." (Con Edison BOE, pp. 43 – 46) The CPB urges the Commission to reject this Company proposal.

The record in this case conclusively demonstrates the risk to ratepayers of enabling the Company to recover T&D infrastructure expenditures beyond levels explicitly reviewed and approved by the Commission. (RD, pp. 100 – 113) Con

Edison's proposal, however, would ignore this important lesson, by enabling the Company to obtain reimbursement from customers, of all T&D spending up to the amounts it proposed in this case. As explained above, the ALJ's found that customers should provide funding for T&D capital expenditures up to 92% of the amount requested by the Company, subject to the results of the audit.

There is simply no merit to the Company's proposal that ratepayers be responsible for spending beyond that level. Accordingly, it should be rejected by the Commission.

#### VIII. CAPITAL EXPENDITURES, AUDIT AND TEMPORARY RATES

A key issue in this proceeding is the adequacy of the oversight and review of the Company's T&D capital expenditures. At issue is whether the Company should be permitted to recover the full amount of the \$1.616 billion by which actual expenditures under its current rate plan are expected to exceed the amount set in rates, and its annual capital budget of approximately \$2 billion, an amount so large that the Judges stated that it was difficult to find a suitable descriptive adjective. (RD, p. 105) The RD includes an extremely thoughtful analysis of the parties' diverse positions on this vigorously contested issue. Based on careful consideration of the evidence in the record, the Judges concluded that the Company should be permitted to begin to recover those amounts, on a temporary basis, subject to refund pending the results of a management and operations audit. (Id., p. 112)

Con Edison and DPS Staff ask the Commission to reverse the RD on this point. For the reasons explained below, the claims of those parties are without merit. The CPB strongly urges the Commission to protect ratepayers by affirming the RD.

A. Unique Circumstances

The opponents of a comprehensive review of the Company's historical and projected T&D capital expenditures do not properly recognize that unique circumstances require a change from the "business as usual" approach to this issue. The magnitude of the capital expenditures at issue is unprecedented, as explained above. In addition, Con Edison is now emerging from more than a decade of somewhat relaxed oversight, in which, among other things, audits required by the Public Service Law were not conducted. During that period, as the Judges' noted, the pattern of infrastructure spending reflected "far from a healthy balance." (RD, p. 106) Moreover, the record reveals that within a six-week period leading up to its filing in this case, the Company increased its construction forecast for 2008 by \$500 million (RD, pp. 107 – 8), raising substantial questions about Con Edison's management of its infrastructure and whether the funding it requests is actually necessary. At the same time, the prolonged outage of Con Edison's electric system in July 2007 has reduced public confidence in the utility.<sup>6</sup>

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<sup>6</sup> A rupture of the Company's steam system in July 2007 and a natural gas explosion in November 2007 have also raised public concerns about the utility's infrastructure.



In these unprecedented circumstances, it is obvious to the Judges, the CPB, NYC Government Customers and other parties, that thorough scrutiny of Con Edison's historic and projected T&D capital spending is required. The CPB urges that in reviewing the arguments made by opponents of that scrutiny, the Commission carefully consider the unique factors cited above, and reject calls by the Company and DPS Staff to treat the review of the Company's historic and projected capital expenditures as "business as usual."

#### B. The Level of Review

In its BOE, Con Edison renews its claims that the review of its historical T&D capital expenditures was "extensive and detailed" (Con Edison BOE, p. 47) and "intensive and thorough." (*Id.*, p. 48) DPS Staff asserts that there has been no evidence that its review was "incomplete, inadequate, or in any way less than thorough." (DPS Staff BOE, p. 32)

On the contrary, the record shows, as the Judges unambiguously concluded, that the "review" of historical T&D expenditures was not sufficient. (RD, pp. 104 – 113) Based on a careful review of the record, the ALJs explained that further review of the Company's T&D capital spending is necessary, because, among other things, "we lack confidence in the record supporting the conventional analysis" (*Id.*, p. 105) and "whether the money is being spent efficiently is still, in our opinion, an open question." (*Id.*, p. 109)

Assertions that the Judges erred in reaching those conclusions, cannot be squared with the record in this case. It is inconceivable that a comprehensive

review, particularly given the unprecedented magnitude of the expenditures, would have resulted in no proposed adjustments, no questions or concerns for further review, and no documentation. However, the record shows that the alleged “review” did not lead to any proposed adjustment of the \$1.616 billion of spending (TR 4755), did not result in any recommendation to the Judges or the Commission (TR 4136; 4755-6), and did not result in any public document produced by DPS Staff. (TR 4135) Moreover, the alleged “review” is not verifiable, since DPS Staff was not able to produce any regularly kept records from the time the review was allegedly undertaken (TR 4753), and the Company was able to produce only scattered e-mails regarding a sample of those meetings. Also, the “review” was not conducted in an open and transparent manner, since only DPS Staff and the Company participated – other parties were not even invited.

As a result, parties including the CPB, NYC Government Customers, County of Westchester and Local 1-2 have called for a further investigation of the Con Edison’s historical and projected capital expenditures. The Commission should affirm the RD on this point.

C. The PSC, Not DPS Staff, Should Address Issues of This Magnitude

Con Edison asserts that a further review of its infrastructure spending is unwarranted because of its “on-going consultation with Staff.” (Con Edison BOE, p. 57) DPS Staff voices a similar opinion. (DPS Staff BOE, pp. 28 – 30)

On the contrary, only the PSC has authority to establish rates to be charged by utilities under its jurisdiction, and to do so, it requires a complete and accurate record. As explained above, however, on the issue of whether ratepayers should be required to fund the \$1.6 billion by which capital expenditures exceeded those under the Company's current rate plan, the record contains no analysis and no documentation on which the Commission can possibly conclude that ratepayers should be required to fund the entire amount at issue. Instead, DPS Staff and the Company argue that Commissioners need not concern themselves with the \$1.6 billion issue, since all matters were resolved in a series of behind-closed-door meetings in which only two parties participated, the only documents on the record were produced by the utility, and which require ratepayers to fund the entire amount.

The CPB strongly urges the Commission to assume control of this issue and direct that the Company's historical and projected infrastructure be further scrutinized in an open and transparent manner, before ratepayers are required to fully fund the amounts at issue.

#### D. Legal and Equity Issues

Con Edison asserts that there is no legal or equitable basis to impose any conditions on its recovery of the T&D capital expenditures at issue. (Con Edison BOE, p. 54) That claim is erroneous. The Company's contention completely ignores its own rate plan, which explicitly states that if actual T&D infrastructure spending exceeds projected levels, the differences will be

deferred and recovered from customers ...after expiration of this Electric Rate Plan, in a manner to be determined by the Commission. However, at the end of each Rate Year, and subject to audit and prudence review, the Company may apply any available credits... (Case 04-E-0572, Rate Order, Joint Proposal, p. 10)

This clearly indicates that the Commission has the authority to conduct an audit and prudence review of the \$1.6 billion of capital spending in excess of projected levels before approving recovery from customers. Moreover, as explained above, the public interest requires that it do so.

Contrary to Con Edison's contention, the Judges' recommendation is equitable to the Company and its customers. Should a proper investigation reveal that Con Edison is correct in asserting that ratepayers should fund the full amount of T&D expenditures at issue, the Company would suffer no financial harm. However, from consumers' perspective, equity and public confidence in the regulatory process require that the costs in dispute be reviewed in an open and transparent manner.

#### E. The Role of the Management Audit

To address the demonstrated need for further scrutiny of Con Edison's historic and proposed capital spending, the Judges recommended that these issues be addressed as part of a management and operations audit pursuant to Public Service Law ("PSL") §66(19). DPS Staff criticizes the ALJs on this point, claiming that a management audit is not intended for this purpose and is not the proper vehicle for this investigation. (DPS Staff BOE, pp. 28 – 32) It then

concludes that no further scrutiny is required. Its assertion regarding the role of a management audit is a red herring, and its overall conclusion is untenable.

The further investigation of Con Edison's capital expenditures need not be conducted under the auspices of PSL §66(19), yet there is no prohibition against the necessary review being conducted as part of such an audit. The Commission unambiguously has the authority to conduct any investigation it deems necessary, in whatever format and on whatever schedule it deems appropriate, to achieve its basic mandate of ensuring safe and adequate service at just and reasonable rates. Given DPS Staff's position on this matter, it is imperative that Con Edison's historic and projected capital expenditures be investigated by independent experts, subject to review and comment by all parties in an open and transparent process, as CPB has recommended throughout this proceeding. (CPB IB, p. 27)

#### F. Summary

Although it stands to reason that the Company wishes to avoid a thorough review of its actual and proposed T&D capital expenditures, the CPB continues to be disappointed in the position taken by DPS Staff. In its Initial Brief, DPS Staff properly identified several concerns with the Company's projections of the costs of its capital projects, and concluded that "a closer scrutiny of the Company's T&D capital expenditures, including all proposed projects and programs can be justified." (DPS Staff IB, pp. 169 – 171) Since then, however, it appears that the authors of DPS Staff's briefs are willing to risk subjecting Con

Edison's customers to unwarranted costs, rather than move forward in a constructive manner to protect consumers. The CPB strongly urges the Commission to adopt the balanced approach taken by the Judges, and ensure that the Company's historic and proposed T&D capital expenditures are properly scrutinized in an open and transparent process.

#### IX. COST OF EQUITY

The Judges recommend that the PSC approve the 9.0% return on equity ("ROE") proposal made by the CPB and DPS Staff, an estimate derived using the methodology employed by the Commission for many years. They conclude:

We find no basis in this case for the Commission to depart from the Generic Finance Case approach that has been a cornerstone of the Commission's standard ratemaking for the last decade. This approach has been used successfully to establish the multi-year rate plans that the Commission has approved in the recent past and its use has been upheld in at least two fully-litigated rate proceedings recently decided by the Commission. The assertions and arguments presented by the Company are not new and they are no more persuasive having been presented here by the Company. (RD, p. 134)

Con Edison complains that the RD summarily rejected the Company's concerns as "not new" and providing no basis for the Commission to depart from the Generic Finance Case approach. The Company contends that the RD's "rote adherence to the Generic Finance Case approach in this proceeding is both unreasonable and misguided." (Con Edison BOE, p. 66)

On the contrary, it is Con Edison's repetition of the same arguments that it has raised since the Generic Finance Case that is unreasonable and misguided.

The Judges were entirely correct in rejecting Con Edison's arguments as "not new." (RD, p. 134) In fact, many of the arguments raised by Con Edison were thoroughly considered in the Generic Finance Case, a proceeding in which Con Edison and other utilities actively participated and signed many of its agreements.<sup>7</sup> Con Edison points out that the RD in that case was never adopted by the Commission. While that is true, the PSC has consistently relied on the findings of that RD. Minor changes have been made over the years, such as replacing Ibbotson Associates with Merrill Lynch as the source of data for determining the risk-premium; however, the vast majority of the Generic Finance methodology has been affirmed by the Commission time after time.

The Company continues to present the same arguments in opposition to the Generic Finance approach, which have been repeatedly rejected by the Commission. First, it contends that a fundamental flaw in the Generic Finance methodology that the RD in this case failed to address, is the distinction between market and book values. (Con Edison BOE, pp. 66 – 68) That assertion is incorrect. The RD demonstrates that the ALJs fully considered Con Edison's arguments and conclude that they do not warrant modifying the DCF approach or assigning it any less weight. (RD, pp. 135 – 136)

Next, the Company recites its oft-repeated mantra that the CPB/DPS Staff recommendation of 9% ROE, if adopted by the PSC, would be the lowest in the country and the lowest granted in New York State in decades. (Con Edison BOE, pp. 68 – 70) These arguments were raised by the Company in its rebuttal

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<sup>7</sup> Con Edison was a signatory to the Return on Equity Consensus Document, June 3, 1993, an agreement that resolved the vast majority of issues that the Company now disputes in this proceeding.

testimony and the CPB thoroughly responded to them in our IB. (CPB IB, pp. 32 – 33) Contrary to the Company's contentions, the CPB/DPS Staff recommendation would provide Con Edison a fair return for the risks to which it is exposed under PSC regulation. It is also consistent with the most recently authorized ROE for an electric utility in New York State, which was 9.1% for Orange & Rockland's electric operations in October 2007.<sup>8</sup>

The Company further states that the ROE recommended by CPB/DPS Staff, as well as the ALJs, is approximately 200 basis points below the average ROE of 11.1% for the utilities in the proxy groups used to derive that recommendation. (Con Edison BOE, p. 69) The Company made this same argument in its rebuttal testimony and we addressed it thoroughly in our IB. (CPB IB, p. 33) As explained there, Con Edison's primary evidentiary support for its contention was a table of allowed returns for certain U.S. utilities. On cross-examination, however, the Company's witness acknowledged that he did not know whether the returns shown were used for ratemaking purposes or as thresholds for earnings sharing; whether they were the result of litigation or multi-year settlements; or even whether they were approved recently. He further admitted that for one company of which he did have knowledge, ALLETE, the current ROE was authorized in 1994. The witness also acknowledged evidence

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<sup>8</sup> 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 Setting Permanent Rates, Reconciling Overpayments During Temporary Rate Period, and Establishing Disposition of Property Tax Refunds, October 18, 2007 ("O&R Order"), p. 9. Since this order was issued, interest rates have declined substantially.



that the ROE for another of the companies on his list, NSTAR, was the result of a seven-year rate plan settlement. (Id., citing TR 2669 - 2674)

The Company also rehashes its contention that that the DCF and Capital Asset Pricing Model (“CAPM”) methodologies suffer from circularity problems (Con Edison BOE, pp. 70 – 71), an argument previously made in its rebuttal testimony. The Commission properly disposed of this argument in its O&R Order, in which it concluded that “the circularity of Staff’s sustainable growth calculation is overstated” because the forecasts of expected future earnings “reflect investor expectations about how a wide variety of other factors, unrelated to the allowed cost of equity, will affect the overall earnings.”<sup>9</sup> It approved DPS Staff’s DCF analysis in that case, which used the same methodology employed by CPB and DPS Staff here, as “superior and reliable.”<sup>10</sup>

Additionally, the Company once again challenges the use of the 2/3, 1/3 weighting of the DCF and CAPM methodologies since it believes that the DCF method is seriously flawed. (Con Edison BOE, p. 71) In the O&R Order, the Commission revalidated all of the critical elements of the DCF and CAPM models employed by the CPB and DPS Staff. It also confirmed the weighting of the results of the two models, saying that it would “continue to accord two-thirds weight to the DCF result and one-third to the CAPM.”<sup>11</sup>

Finally, Con Edison claims that the ALJs’ recommended ROE will jeopardize the Company’s credit rating. (Con Edison BOE, pp. 73 – 74) We

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<sup>9</sup> Id., p. 10, emphasis in original.

<sup>10</sup> Id., p. 11.

<sup>11</sup> Id., p. 14.

disagree. The Company has provided no evidence of its contention, such as reports from rating agencies.

For all of these reasons, the CPB urges the PSC to affirm the RD's finding regarding the ROE to be used in establishing Con Edison's rates in this proceeding.

#### X. RESIDENTIAL CUSTOMER CHARGE

The ALJs adopted the CPB's proposal that the customer charge for Service Classifications ("SC") 1 and 7 be increased to \$12.20, corresponding to the results of the cost of service study ("ECOS") for SC 1. (RD, pp. 150 – 151) Con Edison criticizes this recommendation, saying that it ignores the fact that the SC 7 customer cost, according to that study, is \$17.37. (Con Edison BOE, pp. 77 - 78) Contrary to the Company's assertion, the Judges took all factors into account including customer costs and the number of affected customers in developing their recommendation.

Based on the Company's ECOS, the customer costs for SC 1 and SC 7 are \$12.20 and \$17.37 respectively. (Exhibit 7, Table 6, p. 2) The CPB recognizes that SC 7 customer costs are above the current charge and that the PSC currently requires the SC 1 and SC 7 customer charge to be the same. Determination of the appropriate charge must consider the fact that there are 2.6 million SC 1 customers and only 16 thousand SC 7 customers. The Company's proposed customer charge of \$15.21 would overcharge 2.6 million SC 1

customers by \$3.01 per month,<sup>12</sup> a total of \$94 million annually. Alternatively, the customer charge of \$12.20 would undercharge 16,000 SC 7 customers \$5.17 per month, a total of less than \$1 million annually.<sup>13</sup> In evaluating these options, the ALJ's appropriately considered the relative impacts on SC 1 and SC 7 customers, and we fully support their recommendation. The Company's arguments do not consider customer impacts and should be rejected.

#### XI. CON EDISON'S PROPOSED THREE-YEAR RATE PLAN

Con Edison alleges that the RD erred in not adopting the Company's proposed three-year rate plan, under which rates would increase beginning April 1, 2009 and April 1, 2010 by \$323.1 million and \$381.0 million, respectively. The Company urges the Commission to develop a multi-year plan that includes the Company's proposal for the second and third years. (Con Edison BOE, pp. 101-2)

The CPB recommends that the Commission reject that proposal. The Company's projections for the second and third years were not evaluated by the parties through discovery, responsive testimony or cross examination. As a result, there is an inadequate record on which the PSC can determine the amount of rate increases required, if any, in those years.

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<sup>12</sup> Calculated as the Company proposed charge SC 1 customer charge of \$15.21 less the SC 1 cost of service of \$12.20.

<sup>13</sup> Calculated as the SC 7 customer cost of \$17.37 less the RD approved customer charge of \$12.20.

## CONCLUSION

For the reasons explained herein, the Commission should adopt the January 8, 2008 Recommended Decisions with the modifications identified in the CPB's January 29, 2008 Brief on Exceptions.

Respectfully submitted,



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Chairperson and Executive Director

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Dated: February 12, 2008  
Albany, New York