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May 9, 2008

Hon. Jaclyn Brillling
Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

2008 MAY 12 PM 2:08

Re: Case 06-E-0894 - Proceeding on Motion of the Commission to Investigate the Electric Power Outages in Consolidated Edison Company of New York, Inc.'s Long Island City Electric Network.

Dear Secretary Brillling:

Enclosed for filing you will find the original and twenty-five copies of the Statement of Public Utility Law Project in Support of the Joint Proposal in the above referenced matter.

All active parties have been served electronically. A hard copy as well as an electronic version have been sent to Judge Stockholm.

Sincerely,

Gerald A. Norlander
Executive Director

cc: All parties on Active Parties List (via email)

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission
to Investigate the Electric Power Outages
in Consolidated Edison Company of New
York, Inc.'s Long Island City Electric
Network - Prudence Investigation Phase.**

Case 06-E-0894

**STATEMENT OF PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC
IN SUPPORT OF JOINT PROPOSAL**

**Public Utility Law Project of New York,
Inc.
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194 Washington Avenue, Suite 420
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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission
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**STATEMENT OF PUBLIC UTILITY LAW PROJECT
IN SUPPORT OF JOINT PROPOSAL**

Pursuant to the Procedural Ruling issued by Administrative Law Judge Jeffrey Stockholm on April 25, 2008, the Public Utility Law Project of New York, Inc. ("PULP")¹ submits the following statement in support of the Joint Proposal for resolution of the prudence investigation phase of this proceeding. Familiarity with the prior proceedings and orders, which are recited in the Joint Proposal, and with reports regarding the widespread outage in Long Island City,² Queens, which began July 17, 2006, is assumed.

¹ PULP is a not-for-profit corporation which for more than twenty-five years has represented the interests of low and fixed income consumers in energy and utility matters, including numerous Commission proceedings.

² *E.g.*, Con Edison's September 25, 2006 Part 105 Report, available at http://www.dps.state.ny.us/06E0894/06E0894_LIC_Part_105_Filing.pdf
Assembly Task Force Report, Jan. 30, 2007, available at http://www.pulp.tc/Queens_Task_Force_Rpt.pdf
Final DPS Staff Report, Feb. 9, 2007, available at [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/F813FD973CA2310285257267004B9E83/\\$File/LIC_FINAL_REPORT_FEB_9_07.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/F813FD973CA2310285257267004B9E83/$File/LIC_FINAL_REPORT_FEB_9_07.pdf?OpenElement)

**THE JOINT PROPOSAL SATISFIES THE COMMISSION'S
STANDARD FOR APPROVAL OF SETTLEMENTS, IS IN
THE PUBLIC INTEREST, AND SHOULD BE APPROVED**

The Commission will approve agreements reached among parties for resolution of a matter only if the proposed resolution satisfies the Commission's standards. The Commission has summarized its standards as follows:

A desirable settlement should strive for a balance among (1) protection of ratepayers, (2) fairness to investors and (3) the long term viability of the utility; should be consistent with sound environmental, social and economic policies of the Agency and the State; and should produce results that were within the range of reasonable results that would likely have arisen from a Commission decision in a litigated proceeding. In judging the settlement, the Commission shall give weight to the fact that a settlement reflects the agreement by normally adversarial parties.³

As demonstrated below, the Joint Proposal satisfies this standard, is in the public interest, and should be approved.

Protection of Ratepayers

The Joint Proposal provides protection previously unavailable to ratepayers by blocking Con Edison from recovery, through rates paid by consumers, of both the known cost of capital items that replaced facilities that failed or were damaged due to the outage and any return on that investment.⁴ This relieves ratepayers of the burden of at least \$46 million of capital expenses and carrying charges accrued since the replacements were made that otherwise could be subject

³ Case 00-E-0612, Proceeding on Motion of the Commission to Investigate the Forced Outage at Consolidated Edison Company of New York, Inc.'s Indian Point No. 2 Nuclear Generating Facility; Petition of Certain Members of the New York State Legislature Regarding Indian Point No. 2 Outage, *Order Adopting Terms of Joint Proposal* (Issued February 12, 2004), p. 11, *citing* Case 90-M-0255, *Procedures for Settlements and Stipulation Agreements*, Opinion No. 92-2 (issued March 24, 1992), *Procedural Guidelines for Settlements*, p. 6.

⁴ Con Edison, apart from this proceeding, already has absorbed at shareholder expense approximately \$59 million of non-capital expenses and customer loss reimbursements.

to recovery from consumers through Con Edison electric rates. Thus, future electric rates paid by consumers will not be burdened by the depreciation cost of the new items or by providing for a return on the disallowed \$40 million.

The Joint Proposal provides additional bill credits and payments for residential and business customers of the area affected by the outage and benefits the community harmed by the outage.⁵ These benefits are in addition to the limited customer compensation available under Con Edison tariffs and previously provided. These customer benefits also will be paid to those who live in master metered or submetered housing, who are not direct customers of Con Edison. Con Edison also recognizes that its performance in handling the outage was substandard.

Fairness to Investors

Presumably Con Edison would not have joined other parties to the proposed settlement if it was not in the interests of investors to do so or if it harmed the long term interests of the company. The Joint Proposal quantifies the amount of capital cost recovery that will be disallowed by the Commission, thus ending any uncertainty over the financial impact of the prudence phase of the proceeding. PULP surmises that Commission approval of the Joint Proposal may also benefit investors by reducing the cost of filing detailed testimony and bearing the burden of proof regarding the numerous prudence issues identified by the Administrative Law Judge.⁶ Ending this litigation reduces the diversion of management and counsel resources to

⁵ More than 70,000 residential customers will receive \$100 credits or payments; nonresidential (small business) customers will receive \$200 credits, and large customers will receive \$350. See Joint Proposal at p. 8 - 11.

⁶ Ruling on Scope of Company Testimony, Schedule, and Discovery, (Issued February 8, 2008), available at <http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/7ED475CED8AD31A68525>

defending prudence of past actions, saving costs and enabling the company to focus on the future.

Long Term Viability of the Utility

While the amounts involved are significant, the cost of the Joint Proposal is not so large that it would impair the financial viability of the company.⁷ Con Edison's joinder in the settlement proposal is further indication that its long term viability will not be impaired.

Consistency with Environmental, Social, and Economic Policies of the Agency and the State

Commission policy encourages utilities to provide reliable service under the Commission's relaxed "performance regulation" approach to utility oversight. This approach, which depended on minor deferred rate reductions when statistical measures of reliability were not attained, may have been insufficient to induce Con Edison to make the investments, repairs, and maintenance expenses needed to reduce the likelihood of a major outage in the Long Island City network.⁸ As a result of other aspects of this case, many new investments and changes are now being made to shore up Con Edison's infrastructure to meet load growth in the Long Island City network, maintain sensors, improve situational awareness, and improve emergency management and customer communication systems. While not a substitute for effective and

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⁷ According to its 10-K financial report for 2007, Con Edison of New York had operating income of \$1.28 billion and capital assets of \$24.6 billion. By way of comparison to the amounts involved in the Joint Proposal, the Company invested more than \$1.6 billion in competitive subsidiaries that had only \$42 million operating income in 2007, without impairing its ability to attract new capital. See Con Edison 10-K for 2007, *available at* <http://library.corporate-ir.net/library/61/614/61493/items/280870/10k022208.pdf>

⁸ See *Report of the New York State Assembly Queens Power Outage Task Force*, p. 19 - 23, *available at* http://www.pulp.tc/Queens_Task_Force_Rpt.pdf

improved Commission ratemaking measures, the Joint Proposal, with its disallowance of capital costs and remedial provisions, provides a significant measure of additional sanctions -- not contained in the Commission-approved rate plan that could not retroactively be changed -- to address Con Edison's serious failure to satisfy its common law and statutory duty to provide adequate service.

The remedial provisions also address Commission concern for the costs, hardship, and suffering endured by consumers. The bill credits and payments are well tailored to provide additional redress to those who were affected by the substandard service and failures in the Long Island City network.

The Joint Proposal advances Commission energy efficiency and environmental policies by providing for additional tree planting. This may help reduce future hot weather load and corresponding system stress, improving future reliability in the affected area and decreasing costs of providing service.

Benefits of the Joint Proposal Compared to a Fully Litigated Proceeding

It is difficult to predict the outcome of a litigated proceeding. The Joint Proposal disallows recovery of all the currently known capital costs of the outage. Full litigation may not have achieved that, if the company, and its formidable counsel, could demonstrate in evidentiary hearings their contention that some or all of these costs did not flow from identifiable imprudent acts or omissions.

Alternatively, some might argue that the amount of cost disallowance is too small, because even though it covers all known capital expenses, there may be long term costs of the 2006 outage that are not yet apparent. Had the proceeding continued, it is possible that

additional costs could emerge, if, for example, lines or facilities strained and weakened by the outage fail prematurely under heavy stress next summer. Such costs are unknown now, however, and would be difficult to prove and quantify with any degree of certainty. For example, to determine if a new equipment failure this summer is traceable to stresses from overloads during the 2006 outage or is due to other causes or new stresses, time consuming and costly autopsy of the failed equipment would be required, and even then, the evidence as to causation might be equivocal.

Clearly, remedies provided initially to customers affected by the outage under the filed Con Edison utility tariffs were inadequate. One salutary aspect of the Joint Proposal is to supplement those remedies with additional bill credits and payments. Some have argued that these additional customer benefits are too small. For customers with low or fixed retirement or disability incomes, who often live from check to check without savings, and for whom energy costs are an increasing burden, a utility bill credit of \$100 can have very significant impact on their monthly budgets and their well-being. Thus, PULP disagrees with those who would scoff at the amount of additional bill credits and payments.

The new credits and payments Con Edison agrees to make under the Joint Proposal probably exceed what might have been won in further litigation, because of the narrow scope of remedies available in a prudence review case. Utility prudence litigation is rather limited in the scope of what can be achieved. Typically, it addresses a question whether a utility can recover disputed expenses from its customers, through the ratemaking process, such as the disallowance of \$46 million related to capital items replaced due to the outage. Under the Joint Proposal, in exchange for ending the prudence review, limiting its costs, and concreting its liability in the case

regarding capital items, Con Edison has agreed to do more than the minimum that it was required under its tariffs in the area of customer reimbursement.

Moreover, Commission approval of the Joint Proposal will not foreclose potential court remedies to customers who suffered damages beyond those provided under Con Edison tariffs or under the proposed settlement.⁹ Customers who suffer provable injury and damages as a result of a power outage stemming from a utility's gross negligence can, in theory, recover damages in court, including lost business profits.¹⁰ According to Con Edison's Annual Financial Report for 2007:

From July 2006 through December 31, 2007, Con Edison of New York had paid \$14 million, \$5 million of which was reimbursed by insurers, to compensate customers for spoilage of food and other perishables resulting from the Queens outage, incurred estimated operating costs of \$40 million, \$1 million of which was reimbursed by insurers, invested \$50 million in capital assets and retirements in the Long Island City network after the Queens outage, and reduced revenues under its 2005 Electric Rate Agreement by \$18 million relating to customer outages. *Twenty lawsuits have been filed against the company in connection with the Queens outage seeking generally unspecified compensatory and, in some cases, punitive damages, for personal injury, property damage and business interruption.*¹¹

Accordingly, the Joint Proposal should not be faulted for providing less than full compensation to customers who suffered substantial injury, because they have further options to pursue remedies elsewhere based on their particular situations.

⁹ See Joint Proposal at p. 11, clarifying that the customer bill credits and payments are without prejudice to any claims they may have in other civil proceedings.

¹⁰ The Court of Appeals affirmed a jury finding of gross negligence and damages award in a case arising from the 1977 Con Edison blackout. *Food Pageant v. Consolidated Edison*, 54 N.Y.2d 167 (1981). Also, the City of New York recovered damages from that blackout, based on the *Food Pageant* precedent, in *Koch v Consolidated Edison*, 62 N.Y.2d 548 (1984).

¹¹ Con Edison SEC Form 10-K for 2007, available at <http://library.corporate-ir.net/library/61/614/61493/items/280870/10k022208.pdf>

Agreement Among Normally Adversarial Parties

The Joint Proposal satisfies the Commission's concern that a proposed agreement for settlement of a case should enjoy the support of a range of parties. In this case, it does. Other parties joining in the proposed settlement include Department of Public Service Staff, Con Edison, the City of New York, the New York Consumer Protection Board, Western Queens Power for the People (a community group that participated actively in the proceedings), and PULP.

Commission decisions reflect that PULP from time to time has supported settlements involving Con Edison, notably, an agreement to create a low-income rate that had been opposed by the company for 25 years,¹² and a 2004 agreement to settle the Indian Point outage prudence proceeding. On the other hand, other Commission decisions reveal that PULP is not reflexively supportive of settlements involving the company,¹³ and so for purposes of the settlement

¹² Case 00-M-0095 - Joint Petition of Consolidated Edison, Inc. and Northeast Utilities for Approval of a Certificate of Merger, with All Assets Being Owned by a Single Holding Company *Opinion and Order Adopting Terms of Settlement, Subject to Modifications*, (Issued and effective November 30, 2000).

¹³ *E.g.*, Case 96-E-0897 - In the Matter of Consolidated Edison Company of New York, Inc.'s Plans for (1) Electric Rate/ Restructuring Pursuant to Opinion No. 96-12; and (2) the Formation of a Holding Company Pursuant to PSL, Sections 70, 108 and 110, and Certain Related Transactions. *Opinion and Order Adopting Terms Of Settlement Subject to Conditions and Understandings* (Issued and Effective November 3, 1997) (PULP opposition to settlement providing for divestiture of power plants, creation of holding company, deregulation of generation providers, and other provisions of restructuring settlement); Case 00-E-1750 - Joint Petition of the American Association of Retired Persons and the Public Utility Law Project et al. for an Investigation of the Electric Rates of Consolidated Edison Company of New York, Inc. *Order Denying Petition for Rehearing and Clarification* (Issued and Effective January 3, 2002) (PULP opposition to destabilization of residential electric rates); Case 00-M-0095 - Joint Petition of Consolidated Edison, Inc. and Northeast Utilities for Approval of a Certificate of Merger, with All Assets Being Owned by a Single Holding Company. *Order Denying Petition* (Issued and Effective February 7, 2003) (PULP Petition for faster implementation of low-income rate); 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

standards, PULP should be regarded as a “normally adversarial” active party whose joinder in the settlement is an indicator of reasonable balance. In this case, PULP conducted discovery,¹⁴ obtained discovery rulings,¹⁵ and filed a pre-hearing statement of issues it argued should be addressed by Con Edison in its testimony.¹⁶ PULP now believes it is time for this prudence review phase of the proceeding to come to an end under the terms of the Joint Proposal.

Disaster, filed in C 9187, *Order on Treatment of Electric Interference Costs*, (Issued January 30, 2004).

¹⁴ See PULP Information Requests at http://www.pulp.tc/html/information_requests.html

¹⁵ See PULP Discovery Motion at http://www.pulp.tc/PULPRequestforOrder_ConEd4-13-07.pdf

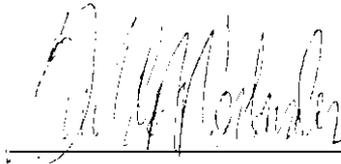
¹⁶ See PULP Proposed *Prima Facie* statement at http://www.pulp.tc/PULP_s06-E-0894_Proposed_PF_StatementFinal7-10-07.pdf

CONCLUSION

The Commission's standards for approval of settlement agreements are satisfied. The Joint Proposal represents a rational and fair resolution of the issues, is in the public interest, and avoids further cost, uncertainty, inconvenience, and delay that would flow from further litigation that is unlikely to yield positive benefits. Accordingly, PULP respectfully requests the Commission to approve the Joint Proposal.

May 9, 2008

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gerald Norlander", is written over a horizontal line.

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