

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on July 24, 2002

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 01-M-0886 - In the Matter of the Rules and Regulations of
the Public Service Commission, Contained in
16 NYCRR, Addition of 3.9(e), Regarding
Mediator Confidentiality.

MEMORANDUM AND RESOLUTION ADOPTING ADDITION
OF SECTION 3.9(e) TO 16 NYCRR

(Issued and Effective August 5, 2002)

BY THE COMMISSION:

INTRODUCTION

On July 17, 2001 the Commission authorized the issuance of a Notice of Proposed Rulemaking (NPRM) to solicit comments on the Commission's proposal to include a provision for mediator confidentiality in 16 NYCRR Section 3.9. The new §3.9 (e) will permit Department of Public Service employees or agents to maintain the confidentiality of mediation communications. The Commission has engaged increasingly in alternative dispute resolution processes in developing public policy and determining and monitoring operating practices among competitors and incumbent providers of regulated services. Department Staff facilitate and mediate numerous cases in which the parties offer confidential communications. This rule is needed to protect these confidential communications from disclosure. A similar provision is contained in 16 NYCRR 3.9 (d) (confidentiality of settlement discussions). Public Service Law § 15 obligates employees of the department to protect from disclosure any

confidential information obtained in the conduct of Department business. The purpose of the adopted rule 3.9 (e) is to extend the protections in Section 3.9 (d) to other alternative dispute resolution processes used in the Department.

ANALYSIS OF COMMENTS AND DISCUSSION

Comments were submitted by four parties.¹ After consideration of these comments which are discussed below, no further revisions to the rule are required. The final rule we adopt is contained in the Resolution attached hereto.

New York State Electric and Gas Corporation (NYSEG) agreed with the need for mediator confidentiality. NYSEG commented:

- a. A strong confidentiality provision must be adopted. NYSEG states it is imperative that the confidentiality of mediation communications be maintained by all participants.
- b. Mediation should be conducted by neutral third parties or Department Administrative Law Judges, and not by Staff. NYSEG believes that under the proposed amendment it is unclear whether agents or employees of the Department can participate in mediation without a neutral party also being present.
- c. Mediation should be limited to those matters within the Commission's jurisdiction. NYSEG believes that Commission representatives should not inject themselves into negotiations under the guise of mediation.

¹ Formal comments were received from Consolidated Edison, New York State Electric and Gas Corporation (NYSEG), Mr. Jeffrey Shankman (citing a ruling he obtained from the Committee on Open Government), and the law firm of LeBoeuf, Lamb, Greene & MacRae on behalf of Time Warner Telecom NY, L.P.

- d. The proposed amendment requires additional specificity as to its applicability. It suggests that mediation should not be directed, should be initiated only after consent by both parties, and should be voluntary rather than required.

The NYSEG comments, for the most part, relate to the applicability and use of alternative dispute resolution processes and tools in our proceedings. These comments will be noted for future reference, but do not relate directly to this confidentiality rule. Otherwise NYSEG articulates the need for a strong commitment to confidentiality in mediation, and appears to support our rule.

Mr. Shankman argues that an advisory opinion by the Committee on Open Government supports his view that the rule is contrary to open government. The letter of the Committee on Open Government addresses our settlement rule in 3.9 (d), not the mediator confidentiality rule in §3.9 (e).

Confidentiality is vital to the process of mediation. Mediation is a process in which a neutral party attempts to bring about the resolution of controversial issues between parties by assisting them in communicating effectively to design a solution to their problem. Consistent with alternative dispute resolution standards and practices, parties to a mediation expect confidences to be maintained. Collaborative proceedings undertaken by the Department usually entail using Department employees as facilitators. In this capacity, our Staff (including Administrative Law Judges) are presented with confidential statements, which should be protected from disclosure to preserve the integrity of the collaborative process. Moreover, participants in these collaborations will participate effectively and openly if their communications are

respected. It is vital to adhere to the ethical standards that have been uniformly developed for mediation.²

Time Warner Telecom Inc. supports the proposed amendment to the Commission's Regulations. Its letter states that since a similar provision already exists for settlement discussions, the confidentiality rule will promote and encourage further involvement in mediation between the parties and the Staff of the Department of Public Service.

Consolidated Edison Company of New York Inc. (Consolidated Edison) supports the rule but seeks to extend the confidentiality to include agreements to mediate and any settlements or agreements reached as a result of the mediation. Typically, agreements to mediate and the result of the mediation, the agreement, are public documents.³ Our orders approving mediation agreements are public documents. It is inconsistent with our practice to keep an agreement confidential as Consolidated Edison suggests, unless the terms of the agreement meet other standards set forth in the Public Officers Law. The concerns Consolidated Edison expresses go to the precedential nature of the agreement and the company's agreement to mediate. Since there is no precedent accorded to the terms of a mediation, nor the decision of a party to mediate, we see no need to revise the rule.

SEQRA REVIEW

We have reviewed the proposed regulation pursuant to the State Environmental Quality Review Act and its implementing regulations and find that it is a Type II action (one previously determined not to have a significant adverse effect on the environment) within the meaning of 16 NYCRR §7.2 (b)(1).

² See 5 USC §574 (1998); AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (1993); Society of Professionals in Dispute Resolution (SPIDR), Ethical Standards of Professional Responsibility (Supp 1995); NY Judiciary Law §849-b (6); and Uniform Mediation Act (Adopted by the ABA, Feb 2002).

³ NY Judiciary Law §849-b; Uniform Mediation Act (February 2002).

CONCLUSION

Having considered the comments received concerning the proposed addition of a new subdivision of 16 NYCRR Section 3.9(e), we hereby adopt the rule as set out in the attached resolution.

By the Commission,

(SIGNED)

JANET HAND DEIXLER
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

RESOLUTION BY THE COMMISSION

Statutory Authority
Public Service Law, Sections 4(1), 15, 20(1)

CASE 01-M-0886 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, Addition of Section 3.9(e), Regarding Mediator Confidentiality.

At a session of the Public Service Commission held in the City of Albany, on July 24, 2002, the Commission, by a unanimous vote of its members present:

R E S O L V E D:

1. That the provisions of Section 202(1) of the State Administrative Procedure Act and Section 101-a(2) of the Executive Law having been complied with, Title 16 of the official compilation of Codes, Rules and Regulations of the State of New York is amended, effective upon publication of a Notice of Adoption in the State Register, by adding a new subdivision (e) to 16 NYCRR §3.9 as shown on the following page.

2. That the Secretary to the Commission is directed to file a copy of this Resolution with the Secretary of State.

Rule 3.9(e)

Confidentiality in mediations. The confidentiality provisions set forth in subdivision (d) of this section shall apply to a neutral and any agent or employee of the Department of Public Service participating in a mediated proceeding. A mediated proceeding is any process in which an alternative dispute resolution technique is used to resolve an issue in controversy, where a neutral may be appointed and specific parties participate. In particular, any oral or written communication prepared for the purpose of a mediated proceeding (mediation communication), shall not be required to be disclosed. A written agreement to enter into a mediated proceeding or reached as a final result of such proceeding, or any communication the parties agree is public information, is not a mediation communication.