Q. Would the members of the Insurance Litigation Panel ("Panel") please state your names and business addresses.

A. (**McCormick**) Maribeth McCormick, 3 Old Chester Road, Goshen, New York 10924.

(**Jaffe**) Carolyn W. Jaffe, 4 Irving Place, New York, New York 10003.

(**Failla**) John Failla, Eleven Times Square, New York, New York 10036.

Q. By whom are you employed and in what capacity?

A. (**McCormick**) I am a Technical Manager in the Environment Health and Safety ("EH&S") department of Orange and Rockland Utilities, Inc. ("Orange and Rockland," "O&R," or the "Company").

(**Jaffe**) I am an Associate General Counsel in the Law Department of Orange and Rockland's corporate affiliate, Consolidated Edison Company of New York, Inc. ("Con Edison").

(**Failla**)I am a partner in the law firm of Proskauer Rose LLP ("Proskauer").

Q. Please describe your educational backgrounds and work experiences.

A. (**McCormick**) I provided this information in the direct testimony of the Environment Health and Safety Panel that Orange and Rockland submitted in these proceedings.

(**Jaffe**) I received an A.B. degree in Government from Smith College and a J.D. from the University Of Virginia School Of Law. I am a member of the Bar of the State of New York. Prior to joining Con Edison in 2008, I was an attorney in the New York Office of Morgan, Lewis & Bockius LLP where I was Of Counsel in the Litigation Practice Group.

(**Failla**) I am a Partner in Proskauer's Insurance Recovery and Counseling Group. With nearly 30 years of experience focusing on insurance recovery for business policyholders, I have helped clients recover more than $2 billion from their insurers through litigation, alternative dispute resolution or negotiation in some of the most significant insurance matters involving a wide range of issues. I received a B.A. degree in

Government and Politics from St. John's University in 1985 and a J.D. cum laude from New York University School of Law in 1988.

Q. What is the purpose of the Panel's update and rebuttal testimony?

A. We are submitting this testimony to address Staff of the Department of Public Service's ("Staff") recommended adjustment to O&R's Site Investigation and Remediation ("SIR") deferral balance, as discussed in the direct testimony of both the Staff Policy Panel and the Staff SIR Panel in these proceedings. We discuss why there should not be any disallowance of $15.2 million related to the Travelers Indemnity Company ("Travelers") insurance policies because the Company's actions were prudent in all respects. We also discuss why the disallowance of any of the legal expenses incurred by the Company during the Travelers litigation is wholly inappropriate.

Staff Report

Q. Is the Panel familiar with the "Staff Report Regarding Orange and Rockland Utilities, Inc. Insurance

Litigation," ("Staff SIR Report") issued May 21, 2018, in Cases 14-E-0493 and 14-G-0494.

A. Yes. As stated in the Staff cover letter for this report, "The Staff Report sets forth a case that O&R's delay in providing notice to Travelers until April 1995 was imprudent, shifting to O&R the burden of rebutting the conclusion that a prudence adjustment to O&R's SIR deferral balances is warranted, to reflect the insurance proceeds O&R would have received had it provided Travelers with timely notice."[1] As noted in the cover letter, the Staff SIR Report concludes that O&R may have acted imprudently when it failed to provide Travelers with timely notice of certain occurrences and claims with respect to seven former manufactured gas plant ("MGP") sites. After extensive litigation, a court found that this provision of late notice vitiated O&R's ability to recover from Travelers, under a series of comprehensive general liability insurance policies ("Travelers Policies"),

[1] Case 14-E-0493 et al., May 21, 2018 Letter from Brandon F. Goodrich, Assistant Counsel, to Kathleen Burgess, Secretary to the Commission, at 1-2 (emphasis added).

any portion of its $15.2 million in primary liability coverage related to the seven MGP sites. The Staff SIR Report concludes that the Company had a known duty to provide timely notice and it failed to do so. As a result of the Company's alleged imprudent actions, the Staff SIR Report concludes that an adjustment to O&R's SIR deferral balance is warranted.

Q. Does the Company agree with the conclusion of the Staff SIR Report?

A. The Company certainly does not. While the Company agrees with Staff that the prudence standard should be employed to evaluate the Company's actions in its dealings with Travelers, the Staff SIR Report misapplied the prudence standard.

Q. How did the Staff SIR Report misapply the prudence standard?

A. As Staff correctly notes, a determination of prudence requires an evaluation of the reasonableness of management's decisions, *i.e.*, whether there was a rational basis for them, based upon the facts and circumstances that existed at the time the decisions

were made. Viewed in this light, and as described in more detail in the Report on Travelers Litigation and Supplemental Report on Travelers Litigation submitted by the Company to the Commission on December 15, 2015 and May 9, 2016, respectively, the Company's actions were prudent.

Q. What facts and circumstances at the time of the decisions provided a rational basis for the decisions?

A. First, the law that existed in the early 1990s when the Company made the decisions differed in two significant respects from the law later stated by the courts in this case. Second, the facts regarding the sites, and Travelers' claims-handling practices, suggest that earlier notice would have been impracticable or futile.

Q. What was the first significant legal change?

A. The law historically required an insured to give notice within a reasonable time of an accident or occurrence considering "all the circumstances." *Sec. Mut. Ins. Co. of N.Y. v. Acker-Fitzsimmons Corp.*, 31 N.Y.2d 436, 441 (1972). Courts were required to

analyze the reasonableness of an insured's timing of notice "in light of the facts and circumstances of the case at hand." *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 19 (1979). This standard had been applied in environmental pollution liability cases to hold that insureds who did not have notice of an occurrence were not required to provide notice of it. *See Reynolds Metal Co. v. Aetna Cas. & Sur. Co.*, 259 A.D.2d 195, 203 (3d Dep't 1999) (timeliness of notice depended on whether insured "had knowledge of on-site contamination causing third-party property damage that was subject to insurance coverage prior to the service of its notices"); *see also Century Indem. Co. v. Brooklyn Union Gas Co.*, 58 A.D.3d 573, 574 (1st Dep't 2009)(requiring insured to provide notice to excess insurers if occurrence was "'reasonably likely' to implicate the excess coverage"). This demonstrates at a minimum that O&R had a reasonable understanding of the standard. Indeed, the New York State Supreme Court initially applied this standard, citing *Reynolds* and *Century*, in its 2009 decision regarding the *Nyack*

site in which it found that O&R's notice was timely. *Travelers Indem. Co. v. Orange & Rockland Utilities, Inc.*, 2009 N.Y. Misc. Lexis 2617 (Sup. Ct. N.Y. Cty. Aug. 19, 2009). In contrast, under the standard the Appellate Division applied in its 2010 and 2015 decisions, an insured is not simply required to give notice if it finds evidence of an accident or occurrence, but rather if it determines that there is the "possibility" of an occurrence. *Travelers Indem. Co. v. Orange & Rockland Utilities, Inc.*, 73 A.D.3d 576, 577 (1st Dep't 2010). This was a significant change.

Q. What was the second significant legal change?

A. The law historically recognized that an insured's lack of knowledge of an accident or occurrence, if reasonable, was a defense to a claim of late notice. *See, e.g.*, *Reynolds*, 259 A.D.2d at 200-01. This was historically applied to mean that if an insured had actual knowledge of an accident or occurrence, it was obligated to investigate and report it in a reasonable time. *See, e.g.*, *White v. City of New York*, 81 N.Y.2d

955, 957-58 (1993); *Mighty Midgets*, 47 N.Y.2d at 20-22; *Woolverton v. Fid. & Cas. Co. of N.Y.*, 190 N.Y. 41, 48-50 (1907). By contrast, the First Department's *Nyack* decision made "failure to investigate" a basis for concluding notice was untimely even in the absence of known or suspected contamination. *Travelers*, 73 A.D.3d at 576. This put a higher level of responsibility on the insured, which was all the more significant because, prior to the December 27, 1994 Draft Consent Order, the New York State Department of Environmental Conservation ("DEC") repeatedly said it did not have authority to require investigation or remediation at MGP sites. In addition, the Travelers Policies had "owned property" exclusions that barred coverage for onsite contamination. Under the *Nyack* rule, the Company was required to conduct full environmental investigations of conditions in the property of third parties even though it had no actual knowledge of, or basis to suspect, offsite contamination, and no basis to expect regulatory activity. This was a significant change.

Q. Did O&R reasonably decide not to provide earlier notice in this case?

A. It is important to recognize the specificity of the sites. Each of the seven properties at issue is distinct from every other property, and facts known about one property could not have provided any basis to believe there had been an accident or occurrence at any other property. At several of the properties, the Company (1) had no actual knowledge of on-site contamination (much less contamination affecting neighboring property or groundwater, necessary to trigger the policies); (2) faced no claim for contamination by any private litigant; (3) faced no contamination-related demand by any regulator; and (4) did not have the information necessary to provide the detailed notice required under the Travelers Policies. For example, the 93B Maple site in Haverstraw ceased MGP operations in 1893 and was sold in 1909; the nearby Clove and Maple site ceased MGP operations in 1935; and the Port Jervis site ceased regular MGP operations in 1938, with demolition of the

building following in 1959. There is no document or testimony demonstrating that the Company had reason to believe pollution likely existed at those sites; nor were there any DEC inquiries regarding them. Indeed, the Company did not even know it had once owned the 93B Maple site. Holding that the Company had a duty to provide notice of occurrence regarding these sites amounts to holding that anywhere an MGP site ever existed, the owner or former owner is deemed to have grounds to provide notice of occurrence. Furthermore, Travelers' practice was to disregard insureds' notice letters if they did not confirm that property damage had actually occurred. At least as to these three sites, the Company reasonably lacked the information it would have needed to provide effective notice of occurrence until years after the Draft Consent Order, and providing any such notice earlier would have been futile given the certainty that Travelers would have rejected such notice.

Q. Does the Company agree with the Staff SIR Report's suggestion (p. 17) that after the Company received the

Draft Consent Order from the DEC on January 3, 1995, it acted imprudently in providing notice of claim to Travelers on April 14, 1995, *i.e.*, the Company should have provided notice sooner?

A. No. On May 1, 1995, Travelers responded to the Company's notice of claim by stating that it was "premature" because the DEC had not even made a claim, and the Company should submit notice when a claim was made. *See*, Exhibit __(ILP-1). As Travelers stated when it received the Draft Consent Order:

"No claim for damages arising out of property damage has been asserted against [O&R]. Rather, the NYDEC has merely requested that [O&R] "gather and provide data." The Travelers is therefore under no obligation to determine its defense and/or indemnity obligations until such time as a claim for damages arising out of property damage is presented. Should such a claim be presented, it shall be incumbent upon the policyholder to provide notice to the Travelers at that time."

This demonstrates that the Company acted reasonably under the circumstances at that time and cannot be faulted for providing late notice of claim.

Q. Does the Company have any further comments to make on this topic?

A. The Staff SIR Report states (at 16) that the "Court of Appeals decision[] rejected O&R arguments on" the changing legal standards. However, the Court of Appeals does not accept, reject, or otherwise address arguments on the merits when it denies a motion for leave to appeal. *See* https://www.nycourts.gov/ctapps/appealsfaq.htm (noting that resolution of a motion for leave to appeal does not reflect "the Court's view of the merits of the appeal").

Adjustment to O&R's SIR Deferral Balance

Q. Does Staff recommend any adjustments to O&R's SIR deferral balance?

A. Yes, based on the Staff SIR Report, Staff recommends an adjustment of $15.2 million to reflect the insurance proceeds that Staff believes the Company

could have received had O&R provided timely notice of its claims to Travelers.

Q. Does the Company agree with this adjustment?

A. Absolutely not. As we will discuss, Staff's recommended adjustment evidences a fundamental misunderstanding of insurers, like Travelers, litigation strategy, as well as the results of recent insurance claims litigation that also reflect changes in law.

Q. Are you suggesting that if O&R was found by the courts to have provided proper notice to Travelers, that Travelers would not have willingly and promptly paid the proceeds of these policies (*i.e.*, $15.2 million) to the Company?

A. Yes. The history of the Travelers litigation shows that even without the notice issue, obtaining coverage would have resulted in further litigation with an uncertain result. Travelers pleaded 29 different grounds for denying coverage to the Company. Putting aside late notice, any one of the other defenses could potentially have barred coverage. Travelers engaged

in scorched earth litigation tactics, in which the parties and non-parties were required to produce millions of documents, over 100 depositions were taken, and over 350 pleadings were filed. The litigation lasted 13 years and included two trips to the Appellate Division. We note that the Company sought to settle this litigation with Travelers but those efforts were unavailing.

For example, Travelers asserted a defense, based on existing case law outside of New York, that damage from MGP operations does not constitute an "accident" or "occurrence" under these policies. Travelers asserted that "every reported decision addressing this issue has reached this conclusion, most on motions for summary judgment." Travelers cited *EnergyNorth Natural Gas, Inc. v. CNA*, 146 N.H. 156 (2001), in which the New Hampshire Supreme Court affirmed the trial court's grant of summary judgment in favor of CNA holding that disposal of MGP wastes and byproducts and the resulting damage was not the result of an accident. This defense would have required a jury

trial to adjudicate, involving dozens of fact witnesses and a battery of expert witnesses on both sides (who already had been retained at considerable expense).

In any event, had the Company prevailed on its appeal of the late notice defense issue, the litigation would not have ended there. Travelers had indicated that it would file additional summary judgment motions on many of its remaining defenses. Regardless of the decisions on those motions by the trial court, additional appeals to the Appellate Division would have resulted, as the N.Y. C.P.L.R. permits interlocutory appeals to the Appellate Division for both the granting and the denial of summary judgment motions. As indicated above, a jury trial likely lasting six to eight weeks would likely have been required to decide fact issues concerning the occurrence issue, some fact issues on notice, the expected or intended defense, the owned property exclusion and other issues. An appeal could well have resulted from the trial verdict.

Q. Are there other factors limiting the amount the Company could have recovered from Travelers?

A. Yes. If coverage had been awarded, it would have been only for years when Travelers was "on the risk", *i.e.*, when the insurer issued policies during the relevant time period of environmental loss. Under the most recent decisions, if the site operations and potential off-site property damage at the various former MGP sites occurred over many decades, the losses claimed may also be allocated over the period of time when they took place. In other words, the insurance policies in effect during that time period may be responsible for only a portion of the losses. Because it is not possible scientifically to determine the exact proportion of damage that took place at a specific point in time such that the loss could be allocated with specificity based on scientific evidence, the law sets forth a series of allocation principles that may be used in such cases. Under New York law, absent proof to the contrary, these costs must be allocated pro rata based on a particular

insurer's time on the risk, *i.e.*, when the insurer issued policies during the relevant time period of environmental loss.

Recently, the law in this area has changed dramatically, to O&R's detriment. The New York Court of Appeals has recently held, in a coverage case involving remediation of MGP sites, that under pro rata time-on-the-risk allocation, insurers are not responsible for costs allocated to periods of time when the policyholder did not have insurance for any reason, even if insurance covering the loss was not available. *See KeySpan Gas E. Corp. v. Munich Reins. Am., Inc.*, 31 N.Y.3d 51, 63 (2018). *KeySpan* was a significant change in the law, because, previously, most courts recognized an "unavailability rule" under which insureds were entitled to coverage for years in which coverage was unavailable. *See KeySpan*, 31 N.Y.3d at 59-60 (reviewing authorities from multiple states; majority applied an unavailability rule). Although the Court characterized the issue as one of first impression in New York, it noted that the

unavailability rule was applied in *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1203 (2d Cir. 1995), a widely-cited Second Circuit case decided under New York law. Thus, *KeySpan* nullified over twenty years of jurisprudence applying an unavailability rule.

In the present case, application of the *KeySpan* rule would reduce significantly O&R's potential recovery from Travelers. The costs for the three sites on which O&R sought leave to appeal from the Court of Appeals would have to be allocated over a long time period because the sites were operated long ago but contamination was only discovered and remediated relatively recently. The costs at Haverstraw 93B would be allocated evenly over a period of 141 years; the costs at Clove and Maple over 113 years; and the costs at Port Jervis over 139 years. (Similar lengthy occurrence time periods applied to the other four MGP sites as well: the Nyack allocation period was 148 years, the Middletown Fulton period was 132 years, the Middletown Genung period was 82 years and the Suffern

period was 98 years.) The Travelers Policies were in effect for only 17 years. Applying the *Keyspan* allocation formula means that the majority of costs would be allocated to the uninsured time period and not to Travelers.

Travelers also had raised an even more limiting alternative allocation argument in defense of the Company's claim. As set forth in its letter dated September 20, 2002, a copy of which is included in Exhibit __(ILP-2), Travelers argued that its liability for all seven MGP sites in total was capped at $827,273. Travelers then offered $500,000 to settle this matter. It contended that because all of the environmental damage for which O&R is or may be liable arises from O&R's decision on how to manage and dispose of its wastes (*i.e.*, the cause of the environmental damage was O&R's decision on how to dispose of its waste), all of the damage from all seven former MGP sites arose out of one occurrence. Travelers also argued that the per occurrence limits of its policies may not be "stacked" to allow O&R to

recover more than one per occurrence limit. Therefore, according to Travelers, its total exposure for all seven former MGP sites was limited to the average of Travelers' per occurrence limits, which it calculated to be $827,273. Travelers then offered $500,000 to settle this matter, *see*, Exhibit __(ILP-2).

Q. Please summarize this discussion regarding the likely recovery from Travelers if the court had found that notice was timely.

A. The Company was not imprudent because it acted reasonably under the circumstances in its provision of notice under the Travelers policies. Even if the Company was imprudent, it would be wrong to assume that its recovery would have been $15.2 million.

Attorneys' Fees

Q. Does Staff recommend any adjustment to the legal expenses that O&R incurred in its litigation against Travelers?

A. No. The Staff SIR Panel states that Staff continues to evaluate the reasonableness of the legal expenses

and carrying costs the Company charged to the SIR deferral. Staff notes that O&R spent approximately $8.8 million to pursue the Travelers litigation, which is more than half of the original claim amount. The Staff SIR Panel then states that the Company, in its rebuttal testimony, should explain why it believes an adjustment for all or a portion of these legal expenses is not warranted.

Q. Is any such adjustment warranted?

A. Absolutely not.

Q. Would the disallowance of all or a part of the Company's legal expenses be consistent with Commission policy?

A. No, it would not. The Commission's longstanding policy is that utilities should vigorously pursue the recovery of SIR costs from its primary and excess liability insurance carriers, including pursuing litigation against those insurance carriers that deny or reserve coverage for such costs. *See*, Case 93-G-0621, *Brooklyn Union Gas Company – Deferred Accounting Treatment*, Order Determining Cost Recovery of

Environmental Site Investigation and Remediation Expenses (issued February 16, 1995). Similarly, the "Inventory of Best Practices for Utility SIR Programs" issued March 28, 2013 in Case 11-M-0034, *Proceeding on Motion of the Commission to Commence Review and Evaluation of the Treatment of the State's Regulated Utilities' Site Investigation and Remediation (SIR) Costs*, requires utilities to pursue insurance reimbursement. Disallowing the Company's litigation expenses will serve to actively discourage vigorous recovery efforts by the utilities.

It is important to remember that O&R did not commence this litigation. Rather, after seven years of denying coverage as premature and taking no action to investigate O&R's claim, Travelers did. Faced with a complaint asserting 29 reasons for denial of coverage, of which late notice was only one, O&R had to either give up its coverage or defend the action. O&R could not know then that Travelers would engage in scorched earth litigation tactics in its quest to deny coverage

or that eight years later the Appellate Division would change the standard for late notice.

Q. Please continue.

A. The significant majority of O&R's legal costs were incurred before August 19, 2009, when O&R prevailed in the trial court on the Nyack MGP site by defeating Travelers' motion for summary judgment on late notice and obtaining summary judgment against Travelers on the late notice defense. Indeed, $7,182,987.96, or 80.9 percent, of legal costs were incurred by O&R prior to the time it prevailed against Travelers at the trial court level. O&R incurred those costs to respond to the extensive discovery that Travelers was conducting, to defeat Travelers' summary judgment motions, and to obtain summary judgment against Travelers. This favorable trial court ruling, prior to a change in the law later made by the Appellate Division, supports the reasonableness and prudence of O&R's efforts especially since O&R would have recovered all of its legal fees from Travelers if it had continued to prevail. O&R then incurred

expenditures necessary to defend the appeal filed by Travelers, as a result of which the Appellate Division reversed the trial court decision in 2010, and to address in the trial court the implications for the other sites of the changes in governing legal standards that the Appellate Division imposed. O&R negotiated heavily discounted fee rates and capped fee arrangements with counsel to litigate the remaining MGP sites, to appeal to the First Department, and to seek leave to appeal to the New York Court of Appeals. Although these efforts proved unsuccessful based on the 2010 Appellate Division decision, this work was performed in a cost effective and efficient manner.

Q. Does this conclude your rebuttal and update testimony?

A. Yes, it does.