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a conEdison, inc. company

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Via Electronic Filing
Hon. Jaclyn A. Brilling
Secretary
State of New York
Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Re: Matter Numbers 10-02562, 10-02634, 10-02693, 11-00463, 11-00938, 11-01705, 11-02263 - Request for Unredacted Copies of Contracts Submitted by Consolidated Edison Company of New York, Inc. for the Years 2010 and 2011 Pursuant to Quarterly Contract Filing Requirements -- Petition for Reconsideration and Stay of Disclosure

Dear Secretary Brilling:

On March 28, 2012, Donna M. Giliberto, Assistant Counsel and Records Access Officer ("RAO") with the Department of Public Service (the "Department"), issued a ruling (the "Ruling") in which she rejected the Statement of Necessity submitted by Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company") on March 20, 2012 requesting that the Department except from disclosure certain contracts filed with the Department that were the subject of a Freedom of Information Law ("FOIL") request. On April 20, 2012, Con Edison appealed to the Secretary of the Commission requesting review and reversal of the RAO's Ruling. By Determination, dated May 9, 2012 (the "Determination"), the Secretary denied Con Edison's appeal. Con Edison hereby files its Petition for Reconsideration of this Determination and Stay of Disclosure of the subject contracts pending the outcome of this Reconsideration (the "Petition").

Request for Reconsideration

In the Ruling denying the Company's Statement of Necessity, the RAO stated that Con Edison did not make a sufficient showing of the likelihood of substantial competitive injury, as required by Department regulations[1] and the New York Court of Appeals,[2] and suggested that to meet its burden of proof, the Company would need to submit more "compelling facts (perhaps submitted in an affidavit by an economist or other expert)" (Ruling, p. 9). In direct response to the RAO's suggestion, on appeal Con Edison submitted sworn expert evidence, in the form of an affidavit by Mr. Russell B. Enerson, a leading expert on procurement practices, demonstrating that allowing disclosure of contract pricing information and competitive bids submitted by the Company to the Department is likely to cause significant economic injury to the Company[3] and, by necessary implication, to the competitive position of the Company.

In denying Con Edison's appeal, the Secretary stated that the Company had failed to demonstrate that "disclosure would be likely to cause substantial injury to the *competitive position* of a commercial enterprise" (emphasis added) (Determination at 10), and stated that "in order for Con Edison to sustain its burden under Encore and Departmental regulations, it needs to focus its facts and arguments on the likelihood of competitive injury, not economic harm." (Determination at 12). This statement, however, does not reflect the Department's regulations, which provide that "the extent to which the disclosure would cause *unfair economic or* competitive damage"[4] (emphasis added) is a factor to be considered in determining whether the information should be excepted from disclosure. Even the RAO acknowledged in the Ruling

[1] 16 NYCRR 6-1.3.
[2] Matter of Encore College Bookstores v. Auxiliary Services Corporation, 87 NY2d 410 (1995).
[3] Mr. Enerson's affidavit demonstrates that disclosure of the prices that Con Edison pays under the contracts at issue here could result in the Company's paying a substantial premium, approximately $61 million, for the same work in the future.
[4] 16 NYCRR 6-1.3(a)(2)(i).

that economic injury is a factor to be considered, noting that the Department's regulations "include two additional factors" that distinguish them from the Restatement of Torts' suggested factors for determining a trade secret claim: *unfair economic or competitive damage* and other relevant statutes or regulations.[5]

Moreover, once economic injury is established, it reasonably follows that a commercial enterprise compelled to pay more for goods and services as a result of public disclosure of private bid or contract information will also suffer a substantial injury to its position as a competitive purchaser. Accordingly, although the Company's Appeal may not have stated explicitly that it would suffer competitive injury if these data are disclosed, this conclusion was implicit in the Company's demonstration.

In addition, unlike unregulated buyers who may elect to purchase, or not purchase, various products if and to the extent such purchases further, or do not further, their personal or business interests, the information for which disclosure is sought in this case is associated with contracts that the Company necessarily enters in order to fulfill its statutory obligation of providing safe and reliable service to its customers at just and reasonable rates. The providers of these services are already aware that the Company cannot avoid these purchases and can only take reasonable steps to mitigate the costs of these services. Accordingly, it is plainly intuitive that publicly disclosing recent price information that is likely to result in economic harm adversely tilts the playing field in favor of competitive providers of services to the Company as a captive buyer. And if the disclosure of these contracts is likely to result in the Company paying a substantial premium for the same work in the future (i.e., approximately $61 million, as demonstrated by the Company's expert), clearly the Company will have suffered competitive injury in its reduced ability to mitigate its costs for services it must obtain. In this context,

[5] Ruling at 6-7.

demonstrating the likelihood of economic harm is tantamount to a demonstration of the likelihood of a competitive injury.

Further, while the Determination states (at 12) that "[t]he Company's expert merely speculates that the potential exists for increased future costs for services and/or commodities," the Determination never addresses, much less directly challenges, Mr. Enerson's methodology and findings. Nor does the Determination explain why Mr. Enerson's expert testimony should be rejected or ignored absent a demonstration by a qualified expert refuting the bases for Mr. Enerson's expert opinions. The Company also finds no basis for the Determination's unexplained conclusion (at 11) that access to this information "could result in more competition among potential bidders." [6]

Finally, the Company respectfully submits that the Determination misstates and misinterprets an important assertion in the Company's appeal (at 6). The Determination states (at 14) that "I disagree with Con Edison's contention that *transparency in government* is not one consideration at play in the present case" (emphasis added). The correct reference in the Company's Appeal (at 6) is "*Transparency in government procurement* is not at play in the present case" (emphasis added). Accordingly, the Company was seeking to distinguish government contracts from private contracts entered into by a public utility, as discussed by Mr. Enerson. The Company agrees with the Commission that transparency is an important consideration in this case and that the Company's customers have a right to know how the utility spends ratepayer funds. However, the proper vehicle to protect customers' interests, which is the Company's objective in this Appeal, is not through disclosure pursuant to a FOIL request. Accordingly, the Commission should reasonably interpret its regulations to deny disclosure

[6] Without opining on the decisions themselves, the Company finds inapt citations to Commission decisions relating to disclosure of certain terms of service agreements negotiated between the utility and end use customers. Determination at 11, n. 26.

pursuant to FOIL in this instance. For the foregoing reasons, the Company respectfully requests that the Commission grant its Petition and reconsider and reverse the Secretary's Determination.

Request for Stay of Disclosure

The Department's regulations provide:

> Information submitted pursuant to subdivision (b) of this section shall be excepted from disclosure and maintained apart by the agency from all other records until 15 days after entitlement to confidential status has been finally denied or such further time as ordered by a court of competent jurisdiction.[7]

The goal of the Company's Petition will be for naught if the contracts in issue are disclosed before resolution of this matter. Therefore, Con Edison respectfully requests that the Secretary stay the disclosure of the contracts at issue pending the outcome of this Petition and any future proceedings that the Company may pursue.

Conclusion

For the foregoing reasons, the Company respectfully requests that its Petition for Reconsideration and Stay of Disclosure be granted.

Respectfully submitted,

c: Jason A. Lange, Esq.

Records Access Officer
Department of Public Service

[7] 16 NYCRR 6-1.3(c)(5).