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Via Hand Delivery

August 7, 2006

ORIGINAL

Brief

05-S-1376

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HOWARD J. RE
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Hon. Jaclyn A. Brillig
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1305

Re: Case 05-S-1376 – Proceeding on Motion of the Commission as to the Rates, Charges
Rules and Regulations of Consolidated Edison Company of New York, Inc. for Steam
Service

Dear Secretary Brillig:

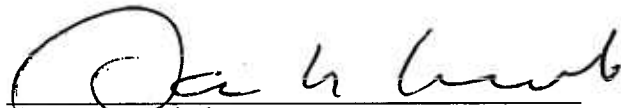
Enclosed please find for filing an original and twenty-five copies of the “Initial Post-
Hearing Brief on Behalf of TransGas Energy Systems LLC,” in the captioned proceeding.

Copies are being served electronically and by first class mail on the active parties.

Very truly yours,

READ AND LANIADO, LLP
Attorneys for TransGas Energy Systems LLC

By:



Sam M. Laniado

SML/lac
Enclosures

cc: Hon. Rafael Epstein (Via Electronic and First Class Mail)
Active Parties (Via Electronic and First Class Mail)
Thomas P. Puccio, Esq.
Of Counsel to TransGas Energy Systems LLC

ORIGINAL

NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 05-S-1376 - Proceeding on Motion of the
Commission as to the Rates, Charges,
Rules and Regulations of Consolidated
Edison Company of New York, Inc. for
Steam Service.

Before the
Hon. Rafael Epstein
Administrative Law Judge

**INITIAL POST-HEARING BRIEF
ON BEHALF OF TRANSGAS
ENERGY SYSTEMS LLC**

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Dated: August 7, 2006
Albany, New York

NEW YORK STATE PUBLIC
SERVICE COMMISSION

Case 05-S-1376 - Proceeding on Motion of the
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Rules and Regulations of Consolidated
Edison Company of New York, Inc. for
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Before the
Hon. Rafael Epstein
Administrative Law Judge

**INITIAL POST-HEARING BRIEF
ON BEHALF OF TRANSGAS
ENERGY SYSTEMS LLC**

Introduction

TransGas Energy Systems LLC (“TransGas”), hereby files this Initial Post-Hearing Brief concerning Section I of the Joint Proposal (“JP”). TransGas also filed a *Statement In Opposition To Joint Proposal*, dated June 19, 2006, concerning the said provision.

The statements in opposition filed by Consolidated Edison of New York, Inc. (“Con Edison”), Department of Public Service Staff (“Staff”) and the City of New York (“NYC”), together with the cross-examination thereof, demonstrate that the wording of the JP does not articulate the intent of the proponents that Con Edison comply with existing Commission requirements to negotiate with potential competitive suppliers of steam prior to filing its Resource Plan. The record evidence overwhelmingly supports the fact that it is in the public interest that Con Edison should evaluate self-supply options, as well as competitively procured capacity options, before it files its Resource Plan. A minor revision to the language proposed by TransGas in its *Statement In Opposition* would cure this deficiency and also address the issues raised by the parties and which TransGas anticipates will be argued in the briefs of the parties.

TransGas expects the proponents to argue that its proposed revision be assigned little or no weight because it was not presented in testimony or otherwise sponsored by a witness. The deficiency in the JP, however, is supported by the cross-examination of the proponents' witnesses. The Commission's Settlement Guidelines explicitly allow a party to make its case through cross-examination.¹

I. THE PUBLIC INTEREST SUPPORTS A REVISION TO THE JP.

A. The Proponents Agree That Competitively Procured Capacity Must Be Evaluated.

The JP requires Con Edison, in the preparation of its Resource Plan, to "examine and discuss various resource options (e.g., maintain and/or rebuild existing boilers, construct a new boiler(s), construct cogeneration, or seek competitively procured capacity)" (Exh. 1 p. 34). As written, Con Edison is not required to "examine and discuss" any particular resource option other than two repowering options for the Hudson Avenue Station in the investment grade evaluation the JP mandates it perform (Exh. 1, p. 33).

The wording used to include other resource options, "examine and discuss various resource options (e.g., . . .)," is not mandatory but simply lists examples of options that could be examined and discussed. Furthermore, whereas the repowering options will be evaluated in great detail, the JP does not require a comparable, thorough evaluation of a competitive offer, only an "examination and discussion."

Cross-examination of Con Edison, Staff and NYC witnesses demonstrated this was not the intent of the parties. Con Edison witness Bozco agreed that Con Edison will evaluate competitive offers to supply steam for consideration in the Resource Plan (Tr. 74, 76, 79, 81, 82,

¹ Cases 90-M-0255 and 92-M-M-0138 *Procedural Guideline For Settlement (1992) para. E.2, pp. 6-7.*

95). Mr. Bozco stated Con Edison will “. . . go out and secure competitively priced alternatives. We will live up to that requirement. . . (Tr. 74). Similarly, he agreed that Con Edison would evaluate in good faith any offers that are brought to it (Tr. 81, 95).

In its *Reply Statement In Support of Joint Proposal*, Con Edison appears to overlook the “e.g.,” and states that “[i]ndeed, the proposal explicitly provides that Con Edison will examine competitively procured capacity” as part of the resource plan that it files with the Commission (Tr. 65). Con Edison also reaffirmed its obligation to:

. . . enter into negotiations with any producers that can offer pricing under terms that are competitive with Con Edison’s *own avoided steam costs*, so long as doing so does not result in the new owner having excessive market power of the type discussed by [the consultant] (Tr. 64) (emphasis added).

DPS witness Padula concurred, agreeing that the public interest is well served if the company has various competitive proposals to consider and that it should compare the repowering options to third party supplier proposals (Tr. 149). He also agreed that a competitive offer by TransGas would serve the public interest.² To this end, *DPS’s Statement in Response* asserts that Con Edison should have “. . . as much information as possible before it makes any decision . . .” (Tr. 130).

NYC also agrees that examining and discussing competitive procured capacity is mandatory.³ According to NYC, “. . . self-supply options will be measured against other supply options, including potential third-party supply agreements, in the *Steam Resource Plan*” (Tr. 192), that the “Plan must examine and evaluate all resource options and identify and support a recommended option,” that Con Edison is required “. . . to evaluate all potential sources of steam

² Accordingly, contrary to the remarks in the DPS Reply Statement, (Tr. 129) the public interest can be served by a private, profit-driven competitive supplier. The Commission’s whole and retail competitive policies rely upon private, profit-seeking entities to foster competition.

³ *Reply Statement of New York City In Support of the Joint Proposal (Tr. 181)*.

on a level playing field and make a rational decision” (*Id.*), and, that “. . . Con Edison *must* evaluate self-supply and third-party supply options against each other as part of the *Steam Resource Plan* and then fully support and justify the utility’s future resource selection” (Tr. 193). NYC goes on to state that, “[p]resumably, Con Edison will be unable to complete the comparative analysis required under the JP, or satisfy any relevant prudency standard without determining the terms and conditions under which available third-party supply options can be secured” (Tr. 194).

B. The Joint Proposal Should Be Revised.

The JP needs to be revised to assure that competitive procured capacity is evaluated against Con Edison self-supply options on a level playing field. The “trust us” posture of the proponents should not be accepted. Con Edison states that it does not necessarily agree with everything other proponents have said (Tr. 62, fn 1). NYC would impose new “viability” requirements on competitive supply options, where none are imposed on Con Edison repowering options, for purposes of evaluating options in the *Steam Resource Plan* (Tr. 202). Before the *Steam Resource Plan* is prepared, however, neither a repowering option nor all competitive supply options will have the permits or financing to build or repower a facility, so they are all “not viable.” They will be workable, contingent on conditions precedent occurring.

The evidence also shows that Con Edison has a financial incentive to repower as opposed to purchase (Tr. 304). Furthermore, NYC’s own recent Energy Task Force Status Report relies upon the repowering options but not the competitive procured capacity option (Tr. 211).

Considering all of the above, the general wording in the JP relegating “competitive procured capacity” to an “example” of what is to be “examined and discussed,” therefore, should be replaced with a tighter, affirmative requirement. As it is, the JP *requires* Hudson Avenue repowering options to be evaluated in copious detail, without any evidentiary basis whatsoever, and based on an incomplete study that has not been subjected to any public scrutiny in this case or any other proceeding (Tr. 137). If there is any undue preference, as Staff argues, it is accorded by the proponents to the Con Edison self-supply options.

TransGas had proposed a new provision for the JP in its June 19, 2006 *Statement in Opposition* (p. 8). The parties objected to that provision for several reasons. Anticipating that those objections will be raised again in brief, TransGas will address them herein.

1. Staff argued that the proposed provision would grant TransGas an undue preference over other potential suppliers (Tr. 130). The provision, however, requires Con Edison to negotiate with any supplier who so requests. TransGas, however, will agree to eliminate the reference to itself from the provision.

2. NYC argues that the proposed language should not bind Con Edison to negotiate based upon its “full avoided steam production and capacity costs” (Tr. 194). Con Edison makes a similar argument (Tr. 65). The Commission has already determined that avoided steam costs is the standard for Con Edison to negotiate competitive pricing terms. (*See, supra*, p. 3) In addition, when TransGas argued in the last rate case that the cost allocations being adopted for the *East River Repowering Project* should not be applied to the eventual calculation of Con Edison’s avoided steam costs by the Commission for competitive market purposes, the Commission agreed:⁴

⁴ *See, Case 03-S-1672, Order Adopting The Terms of a Joint Proposal* (Issued and Effective September 27, 2004).

Addressing the comments TransGas submitted in these cases as the developer of a proposed cogeneration facility, this party correctly observed that the cost allocations we are adopting here for ratemaking purposes would not control (and would probably have no application) in the calculation of Consolidated Edison's *avoidable steam costs* for *competitive market purposes*. Whenever TransGas is in a position to provide steam that competes with Consolidated Edison's service, a proper determination of the utility company's *avoidable costs* will be necessary. However, until TransGas can offer steam to customers, there is no need for us to consider any such cost calculations, nor any reason for us to specify the terms of any such cost studies here. (Emphasis added) (*Id.* 29).

Con Edison mistakenly argues that the Commission rejected the avoided cost standard (Tr. 65). The language quoted above clearly shows the utility's interpretation to be meritless. While the Commission did not agree to perform the calculations before the parties negotiated themselves, it is clear that Con Edison's own avoided costs is the standard to be used for negotiating competitive supply proposals. During cross-examination, the Staff Panel concurred (Tr. 161-162), testifying that Con Edison's costs, and not the costs of the suppliers, is the proper negotiating standard, because the steam market is not competitive enough.

Contrary to the other NYC argument (Tr. 194), TGE's proposed provision cannot be utilized to introduce restraints on Con Edison's ability to strike the best deal for its customers. The provision does not require Con Edison to consummate a deal, only to negotiate proposed terms that will be, as NYC has argued itself, be measured and evaluated against self-supply options (Tr. 192-193).

Lastly, NYC argues that having DPS or an administrative law judge available to assist negotiations will be "cumbersome" (Tr. 194). Neither Staff nor Con Edison objected to this element of the provision. Although Staff did not object to this facet of the proposal, TransGas would agree to remove the reference to Staff from the provision. However, it is TransGas' understanding that the administrative law judges are available to mediate disputes. The name of

their office is, "Office of Hearings and Alternative Dispute Resolution." To that end, National Grid recently filed an agreement it reached with Rochester Gas and Electric Corporation which had been the subject of a mediation conducted by the Hon. Gerald F. Lynch.

As an alternative to adopting the TransGas proposed provision, as revised herein, TransGas would agree to have the "e.g." deleted from the JP, with the Commission adopting as requirements for implementing the JP, the acknowledgements of the proponents stated herein, concerning Con Edison's obligation to seek competitively procured capacity, and evaluate and negotiate offers from potential steam suppliers in good faith, based on its own avoided costs, before the *Steam Resource Plan* is finalized, so they may be evaluated on a level playing field against the Hudson Avenue repowering options in the *Steam Resource Plan*.

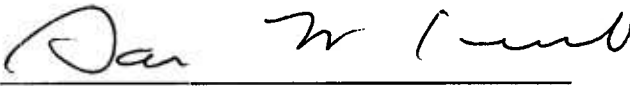
Conclusion

For the reasons stated above, the JP should be revised as provided herein.

Dated: August 7, 2006
Albany, New York

Respectfully submitted,

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