



RECEIVED
PUBLIC SERVICE
COMMISSION
EXEC-FILES-ALBANY

2006 AUG 22 PM 12:10

Brief
05-S-1376

OEE
OHAOR
OGC

Andrew J. Spano
County Executive

Office of the County Attorney

Charlene M. Indelicato
County Attorney

August 18, 2006

Hon. Jaclyn A. Brilling, Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 05-S-1376
Proceeding on Motion of the Commission as
To the Rates, Charges, Rule & Regulations of
Consolidated Edison Company of New York, Inc.
For Steam Service

Dear Secretary Brilling:

Enclosed please find an original and five (5) copies of the County of Westchester's Post-Hearing Reply Brief in the above-captioned proceeding. Copies of this Reply Brief have been sent to Judge Epstein and all parties on the Active Party list by e-mail and hard copy. A hard copy has also been sent to Judge Epstein by copy of this letter.

Please do not hesitate to contact me if you have any questions.

Respectfully submitted,

Stewart M. Glass
Senior Assistant County Attorney

SMG:me
Encl.

cc: Hon. Rafael Epstein

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission as)
To the Rates, Charges, Rule and Regulations of)
Consolidated Edison Company of New York, Inc.)
For Steam Service**

Case 05-S-1376

**POST HEARING REPLY BRIEF
IN OPPOSITION TO JOINT PROPOSAL
COUNTY OF WESTCHESTER**

August 18, 2006

TABLE OF CONTENTS

	Page #
Supposed Benefits of Replacing Waterside with ERRP are Overstated	2
The Specific Technology is Immaterial – the End Result is the Same	3
What is an Increment	6
Data Used by Westchester was Supplied by Con Edison	7
For the Very Reasons Stated by NYC Westchester’s Residents & Businesses Should Not Be Forced To Subsidize the Steam System & the City of New York	8
Westchester Should be Provided Full Participation in Studies	9
The Other Parties Desire for Another Co-Generation Facility Is a Thinly Veiled Attempt for Further Subsidies	10
Conclusion	11

The County of Westchester submits this Reply Brief in response to the claims of Consolidated Edison, the City of New York and DPS Staff of technological differences, use of incorrect data (data that was in fact supplied by the Company), omissions of uncounted benefits or any attempt to question the burdensome and unfair subsidy of the Steam System by the Electric System. A number of the criticisms by the Signatory Parties are raised in an attempt to cloud the issue. Most of the allegations of the other parties were anticipated and addressed in Westchester's initial brief but some answers require repeating or further elaboration.

Con Edison and the City argue that the Joint proposal continues Commission precedent adopted in the last rate case [Con Edison IB p. 7, City IB p. 11]. Con Edison and the City also claim any rate increase would cause the transfer of customers from steam service to electric service [Con Edison IB p. 10, City IB p. 12]. First, it must be reiterated, since Con Edison and the City ignores the fact that the County is not seeking to eliminate all subsidy of the Steam System by the Electric System.¹ As the County notes in its initial brief, the amount of the subsidy and the manner in which it is computed must be reviewed and revised, especially as it relates to fuel costs. Of the over \$100 million of subsidy [Exhibit 17, p. 5], the County is only asking that the fuel costs allocated to the Electric System should not exceed the value in the wholesale energy market of the energy produced at ERRP in a given time period, i.e. a year. For the first year of ERRP's operation, this recommendation would have resulted in a saving to the Electric System of \$37 million [Westchester IB, p. 15] which, if properly paid by the Steam System, would result in approximately a 5% increase in steam rates. It is worth

¹ Though the County reserves its rights in this matter, it is not calling at this time for the elimination of the subsidy of capital costs.

noting that Con Edison, in its filing in this case, proposed a net increase in base steam rates of \$67.6 million or 9.6%, without any indication that it would hurt the Steam System or its viability. [Tr. 43]

Supposed Benefits of Replacing Waterside with ERRP are Overstated

The Administrative Law Judge, at the urging of Con Edison, PSC Staff and NYC eliminated the issue of the allocation of the proceeds of the First Avenue properties from this proceeding. Therefore, the County of Westchester moves to strike any testimony related to the supposed benefits derived from the sale of the First Avenue properties as the issue of the allocation of those proceeds and therefore the ultimate benefit to the electric system of those proceeds, were struck from this case.

Con Edison [Con Edison IB, pp.8, 9] claims a substantial benefit from the sale of Waterside, the retirement of \$145 million in remaining book costs. However, what it fails to acknowledge is that it was replaced with a facility at a cost of almost \$800 million and still climbing. The Electric System's share of that debt is approximately \$530 million or over three and one-half times the total remaining book cost of Waterside that it replaced. That is not a benefit but a further liability. In fact, given that steam plant in-service increased from \$815 million in 2001 to \$1,608 million as of June 30, 2005, due primarily to the construction of ERRP, thereby increasing the capital investment in the Steam System by approximately 100%. [Exhibit 3 – Ap-4]

Con Edison [Con Edison IB, p. 9] alleges that electric ratepayers benefited by the use of \$12 million in proceeds from the sale of the First Avenue properties for community enhancements. The construction of lighted ballfields and an esplanade in NYC do not support Con Edison's argument that electric ratepayers, especially those living in Westchester, benefited from the sale of the First Avenue properties.

Con Edison goes on at length to try and claim that Westchester failed to account for the significant and quantifiable benefits from the sale of Waterside [Con Edison IB, p.

9]. At the best, this claim is overblown hyperbole. The truth is that the Electric System and Steam System are probably worse off with substantially higher capital costs. If, as the City is concerned, the Steam System is so fragile that it is easily susceptible to a “death spiral” (City IB, p. 12] who will pay those stranded costs? Con Edison shareholders, the Steam System or the already overburdened Electric System?

In fact, during cross-examination the County witness directly addressed all of the purported benefits of the sale of Waterside.

The sale, if you will, of building ERRP was that Water Side was going to be retired, the land was going to be sold, and significant benefits were going to accrue that could be used to offset the capital costs of building ERRP.

That did not occur, since the net gain out of Water Side was only three-and-a-half million dollars.

So then if you compare the capital cost of operating Water Side versus the capital costs of operating ERRP, you have an \$800 million plant in ERRP and a \$144 million plant at Water Side.

So ERRP is much more expensive.

And as I just went through, the fuel costs at ERRP are much more than they are at Water Side.

So on any given metric, customers are worse off.” (TR 340-341).

The Specific Technology is Immaterial – the End Result is the Same

Con Edison [Con Edison IB p. 10], Staff² (Staff IB p. 2] and the City [City IB p. 16] all allege that the over allocation of fuel costs to the Electric System is due to the use of different technology at ERRP as opposed to Con Edison’s other plants. The County anticipated this attempt to confuse the record and explained in the County’s initial brief that there is nothing special or unique about ERRP’s technology as compared to Con

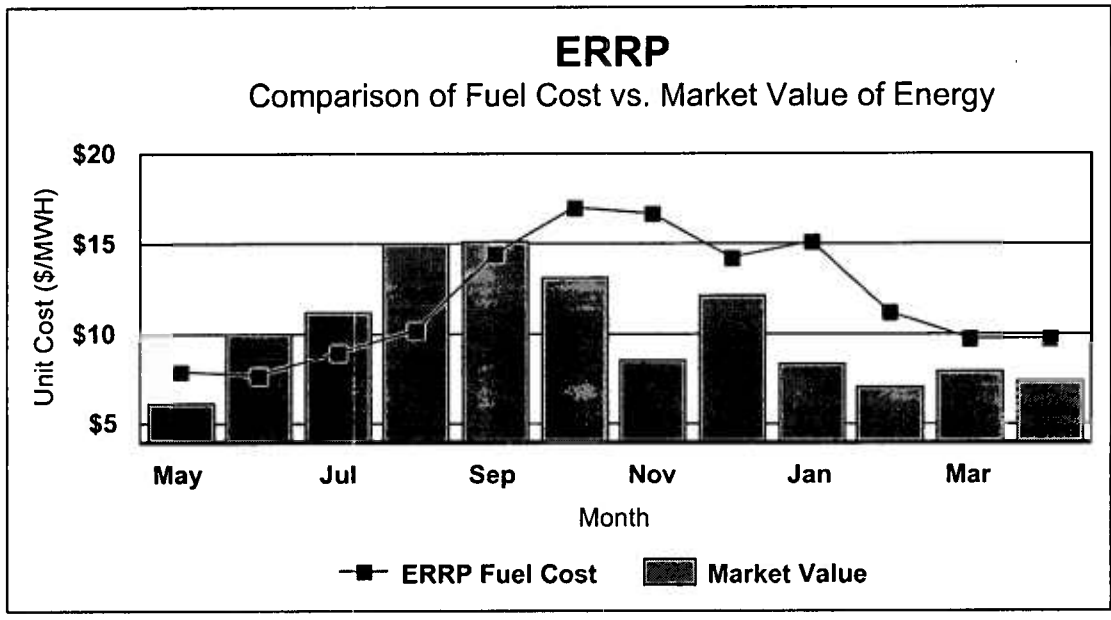
² Staff goes so far as to allege that Westchester is trying to set rates on a “hypothetical” plant when all the County wants is for the Steam System to pay a fair share of ERRP’s fuel costs.

Edison's other co-generation units. In fact, each of the cogeneration units used different technologies to produce electricity and then steam with the effluent energy going to the Steam System.

On cross, Staff admitted that Waterside and East River 6 also produce electricity first [TR 279]. In addition, Waterside and ERRP have essentially the same heat rate [TR 336] (the thermal efficiency measure for the amount of energy used to produce a kilowatt of electricity) therefore it is immaterial whether the plant was built last year or fifty years ago contrary to Staff's assertion that Waterside was somewhat different since it used "modern technology". While the cogeneration stations on Con Edison's system used different technologies to co-generate steam [TR 280 and Exhibit 16], it is immaterial which technology was/is used since the premise of the incremental method is to allocate fuel costs between the steam and electric departments such that the Electric System is charged for the value of electricity [TR 342]. Had that been done for ERRP, like it was done for Waterside, a fairer and larger proportion of the fuel costs would have been allocated to the Steam System.

There is nothing in previous Commission opinions regarding the technology used or whether steam or electric was produced first. Rather the discussion of the use of an incremental method or a proportional method focused on which was the primary product and which output was the by-product. [County IB, pp. 4-6] Con Edison itself, previously acknowledged that steam is not a by-product but an independent commodity that must be priced independently. [Case No. 26794, Petition of Con Edison, March 13, 1975, p.5]

ERRP provides approximately one third of all steam sent out by the Steam System [Exhibit 18 – FWR-4]. A review of ERRP fuel costs compared to the market value of its output is telling. Despite the allegations that the first year of operations was an abnormality or should be disregarded [TR 133-34, City IB p. 16], the chart below clearly demonstrates that the electric output is uneconomic in the electric market in eight out of twelve months (every non-summer month) [County IB. pp. 13-16].



It is uncontested, at least for those eight months of the year, that the primary product of ERRP is steam. The County is not proposing that \$37 million should be properly assumed by the steam system. What the County is proposing is a methodology for calculating how much of the fuel costs should be allocated to and paid by the Electric System and how much should be allocated to and paid for by the Steam System. By applying the methodology and not a set dollar amount, the allegations that the first sixteen months of operation were an abnormality are immaterial. If during the first year of the upcoming rate plan the cost of fuel exceeds the cost of the electricity produced, and

there is no demonstrated requirement that ERRP had to operate to produce electricity during the periods when the fuel costs exceeded the value of the electric output, then to the extent that the cost of fuel exceeds the value of the electricity produced the Steam System would properly pay for that excess cost. If the value of the electricity produced at ERRP during that rate year exceeds the cost of the fuel, that excess would be applied to the Electric System's rent payment to the Steam System.

What Is An Increment

There has been substantial discussion of the incremental method without any analysis of what is an increment. An increment is defined as the item that is added or the amount by which an item changes. [Webster's Ninth Collegiate Dictionary] If a factory produces widgets and the first 100 widgets each cost \$ 1 million dollars and the 101st widget costs \$1 then the incremental cost for that 101st widget is \$1. However, if widgets sell for \$5 each you would not produce 101 widgets and claim that it made economic sense because you could sell the 101st widget at \$4 (less than market) and make a \$3 profit. Someone has to pay for the first 100 widgets at \$1 million each. Even if you sell the first 100 widgets at \$4 each and claim a societal benefit of reducing the market price of widgets to \$4 each, it still results in a loss of almost \$100 million and someone has to pay that cost. In effect, the steam system is claiming it should get the benefits of the 101st widget while the electric system is being stuck with the \$100 million cost. This is especially hard to justify, when there has been no proof adduced at this proceeding that there was any need for the electric output during 8 months of the year.

As to the argument that there is an offsetting benefit by reducing the market price for electricity that argument is only conjecture since it is based on speculation of what the market might have been without ERRP during the winter. But more importantly, as Staff admits, it is against Commission policy for a utility to sell electricity at a loss for the purpose of reducing the market price of electricity. [TR. 309-310] Therefore, the argument that there is a benefit from having Con Edison sell the electric output from ERRP during the 8 winter months at below cost raises serious policy questions for the Commission, which probably would require a separate hearing. Certainly, without a clear change in Commission policy, that argument can not be relied on to justify the transfer of costs to the Electric System.

Data Used by Westchester was Supplied by Con Edison

Con Edison [Con Edison IB, p. 8] alleges that the figures used by Westchester were incorrect. However, the figures used by Westchester's witness were supplied by Con Edison. [Tr. 288-289] It is disingenuous for Con Edison to argue that Westchester's analysis is "misleading" [Con Edison IB, p.8] because the costs reflect "front loading". Con Edison's own witness admitted that Westchester's witness did not "front load" the charges or played with the figures in any way. [Tr. 294-295] The figures were supplied by Con Edison. Westchester used those figures in its analysis. In any case, the issue is not the exact number, since tying Con Edison down to any precise number, whether it be the ultimate cost of ERRP, the allocation of capital and other costs between electric and steam customers, or the operating costs of ERRP, is elusive at best.

For the Very Reasons Stated by NYC
Westchester's Residents & Businesses Should Not Be Forced to Subsidize
the Steam System & the City of New York

It should be noted that New York City states [City IB, p.6] that only two parties oppose the settlement and argues their views should be disregarded because they do not represent Con Edison steam customers or sell steam to Con Edison. [City IB, p.6] Westchester readily admits that there are no Con Edison steam customers in Westchester County though the County does operate its own steam system. [Tr. 215]

While NYC argues that since Westchester is not a customer of the Steam System its concerns should be ignored, it skirts around the fact that Westchester's businesses and residents are still made to pay for the subsidy of that Steam System. In fact, Westchester customers comprise approximately 12% of electric load³ [Exhibit 17, p. 2] and therefore pays for approximately 12% of the Steam System subsidy.

The subsidy of the Steam System and therefore the costs for ERRP that are collected from the Electric System are recovered through the MAC [Case 04-E-0572, Order Adopting Three Year Rate Plan, issued and effective 3/24/05, p. 40]. [P.S.C. No. 9 – Electricity, Fifth Revised Leaf No. 161, Effective April 1, 2005, VII 1. (2)], which is collected from Con Edison's Electric System's business and residential customers. Therefore, Westchester clearly has a vested interest in how ERRP's costs are allocated between the Steam System and the Electric System.

³ Con Edison serves about 3 million electric customers in the New York metropolitan area with approximately 340,000 of those customers located in Westchester.

What NYC conveniently omits is the fact that the City of New York,⁴ as a municipal entity, utilizes approximately 10% of the Steam System's output [Exhibit 17, pp. 2-3] [Exhibit 11]. Even more telling is that the City does not pay the MAC [Case 04-E-0572, Order Adopting Three Year Rate Plan, issued and effective 3/24/05, p. 91] [Joint Proposal, p. 7 & Appendix E, appended to March 24, 2005 Order] As such, the City directly benefits from any subsidy of ERRP while avoiding any obligation as an electric customer from paying any portion of that cost. Thus it is the City's motives that should be carefully reviewed in this proceeding.

Westchester Should be Provided Full Participation in Studies

Con Edison states that "Westchester will have ample opportunity to challenge a recommendation in the Resource Plan should the underlying justification be based on an allocation method to which Westchester objects." [Con Edison IB, pp. 11-12] It is clear that Con Edison wants to limit Westchester's role to objecting to the final product, thereby depriving Westchester the opportunity of having any input into the Plan or the decision whether to repower Hudson Avenue. This is purely an attempt to shift the burden to Westchester to refute the findings of any plan or report. As we all know, the framing of the parameters and the establishment of guidelines for such a Plan and for the Hudson Avenue study has a substantial impact on the final result. Therefore, depriving Westchester of participation in the development of the Plan and reports substantially a) limits its ability to help frame the parameters of the studies which certainly influence the conclusions and b) deprives it of information relating to the underlying assumptions and therefore limits its ability to question those assumptions.

⁴ Including the NYC Housing Authority

In fact, as noted above, it appears that Con Edison is already limiting those areas of the recommendations in the Resource Plan to which it can object to just the allocation of costs. [Con Edison IB, pp. 11-12] This is the very reason that Westchester should be given full participation in the studies and reports. Westchester would be willing to drop this request if the businesses and residents in Westchester were not forced to subsidize the Steam System.

**The Other Parties Desire for Another Co-Generation Facility
is a Thinly Veiled Attempt for Further Subsidies**

Con Edison argues that the incremental method requires that only incremental costs required for the production of steam are allocated to the steam department while common costs or those only required for the production of electricity are allocated to the electric department. [Con Edison IB, p. 5] This is not the result that would occur if a proper analysis was conducted as to which, steam or electricity, is the true incremental product. It is the use of the Signatory Parties' spurious argument, that any combined steam and electric generating facility requires the allocation of the vast majority of costs to the electric system, that concerns the County as it relates to the study of the Hudson Avenue Repowering "Option". As noted above, and in the County's Initial Brief, the pre-ordained result is that production costs for electricity will exceed the value of the electricity produced while providing steam at costs that are so low that there is no other "option" from the Steam System's perspective but to proceed with such a subsidized facility. It is without contention that no "steam only" plant can provide such "low cost" steam without a subsidy nor can any other entity provide steam to Con Edison at such an

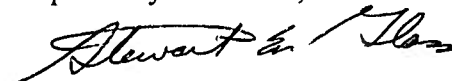
unreasonably low price without subsidy, even if that entity were operating a combined facility since they could not afford to sell electricity at a loss.

At a minimum, the Resource Plan, any resultant steam production study or Hudson Avenue repowering option should not be allowed to just transfer costs from the steam system to the electric system by designing a plant for the benefit of the steam system. The Commission should require that any joint production facility that is considered must take into account the costs to the electric system and must allow full participation of Westchester.

Conclusion

For all the reasons set forth in the County of Westchester's Initial Post-Hearing Brief and in the instant brief, the terms of the Joint Proposal as they relate to the allocation of costs between the Steam and Electric Systems should be revised and the County should be provided full participation in the Steam Resource Plan and the Hudson Avenue Study, including, but not limited to, access to all information.

Respectfully submitted,



Stewart M. Glass, Senior Assistant County Attorney
County of Westchester
148 Martine Avenue
White Plains, New York 10598
Phone: (914) 995-3143/ Fax: (914) 995-2495
E-mail: smg4@westchestergov.com