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April 16, 2004

**Via Electronic & Overnight Mail**

Hon. William Bouteiller  
Administrative Law Judge  
New York State Department of Public Service  
Three Empire State Plaza  
Albany, New York 12223

*ORIG-FILES  
C03-S-1672*

*COPIES:  
MR. K. LAUG  
MR. P. CATALANO  
ALJ BOUTEILLER*

**Re: Case 03-S-1672  
Con Edison's Steam Rates**

Dear Judge Bouteiller:

Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company") submits this letter in response to the April 2, 2004 Motion of the Owners' Committee on Electric Rates ("OCER") to Compel Discovery or Strike The Testimony of Con Edison's Witness Dr. Bahman Litkouhi. Your Honor should deny the Motion.

On March 19, 2004, Con Edison responded to interrogatories from OCER that requested Con Edison to provide the underlying data for certain exhibits that Dr. Litkouhi had submitted as part of his pre-filed testimony on November 21, 2003. Dr. Litkouhi's responses were fully responsive to OCER's requests. The OCER requests at issue and Con Edison's responses thereto were included as part of OCER's motion.

A close examination demonstrates that the Con Edison responses contained precisely what OCER had requested, "tables of values" for the variables shown in the Exhibits, in most cases specifying the precise cells in each spreadsheet that show the table of values. For example, OCER request 2.A. asks: "In Dr. Litkouhi's exhibit labeled BL-3, please provide . . . A table of the values for each of the three variables shown in the figure." The response includes the spreadsheet and states "Please see the Data Sheet columns W and X - rows 9 through 29." Because, however, the spreadsheets contained information that was not required to respond to OCER's request, or was the kind of system technical data that is not ordinarily disclosed, Dr. Litkouhi installed password protection for those portions of the data sheet so that the information could not be viewed. Notwithstanding this password protection, Dr. Litkouhi's response was fully responsive to OCER's interrogatories. In fact, for Exhibits BL-3, 4, and 5, there are 17 columns of data and for Exhibit BL-7, there are 24 columns, and few of these columns are password protected. Indeed, while OCER has been requesting that the password protection be removed, it has never alleged that the interrogatory responses did not

contain precisely what was requested in the interrogatories, *i.e.*, tables of values showing the derivation of numbers in the Exhibits BL-3, BL-4 and BL-7.

OCER's only claim is that it should be provided the electronic worksheets without password protection so that its consultant "can review Dr. Litkouhi's calculations." Motion at 4. It has never told the Company, nor does it state in its Motion, the basis for its claim that the initial discovery response was non-responsive and how removing the password protection will correct any alleged deficiency in the Con Edison response to OCER's discovery request. It has never precisely informed the Company which calculations the consultant would like to perform, how those calculations are necessary to test the accuracy of the submitted exhibits, and which information is lacking in order for OCER's consultant to perform those calculations. Indeed, in his most recent e-mail, the OCER attorney made a blanket request to have Dr. Litkouhi "specify computationally every calculation used in Exhibits BL3-4-5 and BL7."

In an attempt to resolve this matter, the Company has offered to OCER to have its consultant meet or have a conference call with Dr. Litkouhi to discuss the responses and determine what additional information the consultant requires and whether the Company believes that providing the information is appropriate. That proposal was generally accepted, but OCER continues to insist that it be allowed to submit rebuttal testimony (see e-mail exchange attached). Con Edison notes that while OCER claims that it was unable to submit rebuttal testimony because of the alleged deficient interrogatory response, numerous other parties -- including Staff, New York City, and the New York Energy Buyer's Forum -- submitted opposition, and in some cases, rebuttal, testimony responding to the Company's variance recommendation without the information that OCER claims is necessary to file testimony. Moreover, OCER does not make any proffer concerning the rebuttal testimony that its witness was planning to submit and how the information it erroneously claims was requested was essential for the submission of that testimony.

In sum, this Motion should be denied in its entirety because OCER has completely failed to demonstrate that Con Edison's interrogatory responses are deficient and that its inability to submit rebuttal testimony is directly related to those interrogatory responses. Accordingly, Your Honor should also deny OCER's motion in the alternative to strike Dr. Litkouhi's testimony.

Very truly yours,



MLK/md

c: Hon. Jaclyn Brillling  
All Active Parties - Case 03-S-1672

**E-MAIL EXCHANGE ON DISCOVERY MATTER  
BETWEEN CON EDISON AND THE  
OWNERS' COMMITTEE ON ELECTRIC RATES**

Here is the response from Dr. Litkouhi.

Rich Miller  
Con Edison - Regulatory Affairs  
millerrich@coned.com  
212.460.3389 (while the header was not included, this was sent at 4:27 p.m.  
on Friday April 16, 2004)

-----Original Message-----

**From:** Litkouhi, Bahman  
**Sent:** Friday, April 16, 2004 2:42 PM  
**To:** Miller, Richard B.  
**Cc:** Lee-Gaughan, Rose; Litkouhi, Bahman  
**Subject:** RE: 03-S-1672 Con Edison Steam Rate Case; OCER's Motion to Strike

Perhaps he is asking for a "line by line computation" similar to the example I provided in the Mathematical Model we submitted. As I indicated before, Exhibits BL-3, BL-4, and BL-5 are directly from the Company's record with some simple operations such as addition, subtraction, or averaging. Most of the cells in the spreadsheet for these exhibits are Company's data, and those which have a simple formula are visible. Exhibit BL-7 is a little more involved but I believe that if someone (with appropriate technical background) reads the accompanying Math Model, he or she should be able to follow each computation. However, as I indicated before, I am available to further explain and answer their questions through a conference call or if necessary (within Company's policy) to provide some line by line computations for Exhibit BL-7. Please also note that Exhibit BL-7 was provided to explain the forecast model; it was not given to support the inappropriateness of the percentage variance as a measure of losses.

Bahman

Dear George:

We remain willing to arrange a conference call or a meeting between Mr. Ringo and Dr. Litkouhi to discuss the spreadsheets. However, it remains impossible for us to settle this because of your insistence that we agree that Mr. Ringo be allowed to submit rebuttal, if appropriate, after he receives what he believes he needs from Dr. Litkouhi.

I also note that in your previous e-mail you asked for all of the underlying data and now you are asking that our consultant "specify computationally every calculation used in" his Exhibits (I will note that the principal calculations are done using the formulas in the report that he submitted with his interrogatory response). Accordingly, I remain unclear as to what exactly you are demanding and believe that this can be easily resolved by a meeting or call between the consultants.

I will include this e-mail exchange with the motion response.

Rich Miller  
Con Edison - Regulatory Affairs  
millerrich@coned.com

212.460.3389 (while the header was not included, this was sent at 1:09 p.m. on  
Friday April 16, 2004)

-----Original Message-----

**From:** George Diamantopoulos [mailto:gdiaman@ssmplaw.com]

**Sent:** Friday, April 16, 2004 11:31 AM

**To:** Miller, Richard B.

**Cc:** Scott Petersen; Carl Pechman; Martin Ringo; Krayeske, Mary; Richter, Marc; Lubling,  
Chanoch

**Subject:** Re: 03-S-1672 Con Edison Steam Rate Case; OCER's Motion to Strike

April 16, 2004

Dear Richard:

Your e-mail is not encouraging. Your lack of clarity at this stage after we have spelled out exactly what is needed, suggests to me that Con Edison's intention is to merely foster further delay. I did not receive your e-mail by the time I left the office yesterday. Unfortunately, our consultant is unavailable for a conference call today and I am not available this afternoon. In any event, we appear to be out of time for settling this motion before you submit Con Edison's response to OCER's motion.

To reiterate, we want you to either 1) unlock the cells that are protected on Dr. Litkouhi's worksheets, or 2) have him specify computationally every calculation used in Exhibits BL3-4-5 and BL7, which accompany his worksheets in Con Edison's March 19, 2004 e-mail received from Mary Krayeske.

Our witness should not have to reverse engineer and have to guess at what your witness has done. We want to see clearly and exactly the computation steps taken by your witness in producing his Exhibits. It is OCER's position that Con Edison's failure to provide the requested information in either of the two alternatives above strongly suggests that your witness has been less than forthright in creation of his exhibits and in his testimony. It is not reasonable of Con Edison to expect OCER to merely accept Dr. Litkouhi testimony and Exhibits while he hides cells on his worksheets, especially when OCER is willing to execute a confidentiality agreement as stated in previous e-mails to you. Accordingly, we believe, that under the circumstances it is not only appropriate but necessary for Judge Bouteiller to strike the testimony of Dr. Litkouhi.

I look forward to receiving your response to our motion. Please provide Judge Bouteiller with copies of our e-mail exchanges in your response to the motion. Thank you for your courtesy.

Sincerely,

George Diamantopoulos

SEHAM, SEHAM, MELTZ & PETERSEN, LLP  
11 Martine Avenue, Suite 1450  
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----- Original Message -----

**From:** Miller, Richard B.

**To:** George Diamantopoulos

**Cc:** Scott Petersen ; Carl Pechman ; Martin Ringo ; Krayeske, Mary ; Richter, Marc ; Lubling, Chanoch

**Sent:** Thursday, April 15, 2004 5:22 PM

**Subject:** RE: 03-S-1672 Con Edison Steam Rate Case; OCER's Motion to Strike

As I stated previously, your consultant's particular need is still not clear to me so I don't believe that we can agree in advance that we will provide your consultant with whatever he is requesting. Nevertheless, I believe that we should arrange a conference call to determine his needs precisely. Please provide me with some times when your consultant would be available.

As I have stated previously, the Company continues to maintain that it adequately responded to your initial discovery request and that your request for an extension of time to submit rebuttal is unjustified.

Rich Miller  
Con Edison - Regulatory Affairs  
[millerrich@coned.com](mailto:millerrich@coned.com)  
212.460.3389

-----Original Message-----

**From:** George Diamantopoulos [mailto:gdiaman@ssmplaw.com]  
**Sent:** Wednesday, April 14, 2004 8:09 PM  
**To:** Miller, Richard B.  
**Cc:** Scott Petersen; Carl Pechman; Martin Ringo; Krayske, Mary; Richter, Marc; Lubling, Chanoch  
**Subject:** Re: 03-S-1672 Con Edison Steam Rate Case; OCER's Motion to Strike

April 14, 2004

Dear Richard:

As I mentioned to you when we spoke late this afternoon on the telephone, part of our Motion is asking for rebuttal of Dr. Litkouhi's testimony. The hiding of the information on the worksheets, which is not contested, is the basis for the motion and the reason why our consultant could not check your consultant's work and contest his conclusions in rebuttal. While the information disclosed in the worksheets gives a glimpse into what Dr. Litkouhi did, it does not give the full picture. Consequently, OCER's consultant could not be expected to challenge your consultant's testimony in rebuttal based upon incomplete information. Con Edison's agreement to the submission of rebuttal, subject of course to Judge Bouteiller's approval, is not negotiable and therefore I must insist on it as part of any settlement of the motion. I disagree with your self-serving interpretation that our needs resulted from a failure to communicate and your attempt to characterize events in this manner is nothing more than an attempt to overly complicate what is a very simple discovery dispute.

If you are willing to provide the underlying data and other statements information requested in my April 13th e-mail and a conference call is required between the consultants and us to make sure everyone is on the same page and we receive exactly what is needed by our consultant, that is fine. As I previously mentioned, we are willing to execute a confidentiality agreement and have no interest in any alleged proprietary information beyond the testing of your witness's analysis and testimony for the purpose of this PSC proceeding. In the

interim, if you are willing to settle the portion of our Motion requesting the undisclosed requested information and have Judge Bouteiller decide the issue of whether we may submit rebuttal, then we are amenable to proceeding this way.

In the event, we cannot reach an agreement, in whole or in part, we would ask that you include our e-mail exchanges with Con Edison's response to our Motion for the Judge's consideration.

Sincerely,

George Diamantopoulos

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----- Original Message -----

**From:** Miller, Richard B.

**To:** George Diamantopoulos

**Cc:** Lubling, Chanoch ; Richter, Marc ; Krayeske, Mary

**Sent:** Wednesday, April 14, 2004 5:15 PM

**Subject:** RE: 03-S-1672 Con Edison Steam Rate Case; OCER's Motion to Strike

Dear George,

Pursuant to your e-mail yesterday, it now appears, for the first time, that what you are asking for is the underlying data for certain cells or a definitive statement concerning what the data in certain cells represents (you also ask for cell formula(s), where necessary, but it does not appear that such formula(s) is necessary to enable your consultant to understand Dr. Litkouhi's testimony). I am still not entirely certain, however, as to what your consultant needs and why.

We are willing to provide you the underlying data, if appropriate, and statements concerning what the data in certain cells represents. I believe, however, it would be better to first arrange a meeting or conference call between Mr. Ringo and Dr. Litkouhi so that Mr. Ringo can ask his questions in person and then we can decide what kind of written information is needed. We will not provide, however, any cell formula(s) that are proprietary.

Finally, we cannot agree to allowing your consultant to submit rebuttal if we reach agreement on this. We believe that we adequately responded to your initial interrogatory request and that any delay in providing your consultant with any information that he needs resulted in major part from the inability to communicate your needs more precisely until yesterday, although I am still not entirely certain as to what he needs.

Please let me know if you are willing to pursue this settlement.

Rich Miller  
Con Edison - Regulatory Affairs  
millerrich@coned.com  
212.460.3389

-----Original Message-----

**From:** George Diamantopoulos [mailto:gdiaman@ssmplaw.com]

**Sent:** Tuesday, April 13, 2004 11:29 AM

**To:** Miller, Richard B.

**Cc:** Lubling, Chanoch; Carl Pechman; Martin Ringo; Scott Petersen

**Subject:** 03-S-1672 Con Edison Steam Rate Case; OCER's Motion to Strike

April 13, 2004

Dear Richard:

Confirming our telephone conversation of yesterday, the information our consultant Martin Ringo of Power Economics requires is set forth below.

Although not discussed yesterday, Power Economics and OCER are willing to execute a confidentiality agreement not to use the disclosed information for any purpose other than that Mr. Ringo can obtain the information hidden from Mr. Litkouhi's worksheets in order to check his work, and for OCER to submit rebuttal testimony to Dr. Litkouhi's testimony and his calculations in the Con Edison Steam Rate Case.

Absent a showing that the formulas or the data comprising the worksheets are proprietary, I remain skeptical. Nonetheless, in OCER's continuing attempt to resolve this matter in good faith, if Con Edison alternatively provides the information needed by OCER's consultant as set forth below and stipulates to allowing OCER to submit rebuttal testimony to Mr. Litkouhi's testimony within seven (7) days of receipt of the requested information, then we can submit our mutual agreement for Judge Bouteiller's approval and thereby resolve OCER's pending motion to strike Dr. Litkouhi's testimony.

BL-3, 4, and 5

Dr. Litkouhi said in his response to our data request "The monthly rolling sendouts are averaged over 12 months (January through December); for an example, see cell K19 in the Data Sheet." Cell K19 is a sum of twelve months data divided by 12. Unfortunately, the cells that were summed have their computing formulae hidden. Thus, Dr. Litkouhi's values in BL-3 cannot be reproduced. This applies to BL-4 and BL-5 also because he gave the same answer to the data requests for those attachments.

What we want regarding BL-3 is either 1) the underlying cell formulae showing the computation or 2) a definitive statement (a computing instruction) of what the variables in BL-3, 4, and 5 represent with regarding to the underlying data.

Mr. Ringo wants the information in either Dr. Litkouhi's own words in a manner that allows for reproduction, or in spreadsheet formulae that may be shown and checked by third parties.

BL-7

Dr. Litkouhi has presented a graph (BL-7) of the accuracy of his model. In response to our data request for the documentation of that model (which should have been part of the work papers), he gave us a spreadsheet. First, Mr. Ringo is not certain what data points in the spreadsheet are being represented on the graph. Second, he is not clear as to what data is being used as inputs in the computation of the points on the graph. In this regard, Dr. Litkouhi's spreadsheet lists the following variables:

PSO, Avg  
TSO, Avg  
hSO, Avg  
PSL, Avg  
XSL, Avg  
MSO  
FLK  
PSO, Avg  
PSL, Avg  
PSys, Avg  
hSL, Avg  
hLK, Avg  
hC, Avg  
MLK  
MC  
MSL  
Q and  
sales

We want the actual data, on a monthly basis, used for these variables for BL-7. This data must be accompanied with an identification of what the data represents with regard to being measured values, averages, forecasts or some other transformation of the underlying measurements. Third, we also want either 1) the cell formulae used for the computation or 2) a definition statement (a computational instruction which should be in the form of a single equation with % losses in the month as the dependent variable) of what was done to compute the values used in BL-7.

Finally, OCER believes that if an expert witness cannot show his

calculations, he should not be permitted to testify as to those calculations, hence OCER's Motion to Strike. The underlying calculations for the attachments BL 3, 4, 5, and 7 are deliberately hidden from the other parties and therefore Dr. Litkouhi's calculations cannot be checked or confirmed. In other words, we should be able to reproduce his results to check his work, or we have to take Dr. Litkouhi's word for what he did, which we are unwilling to do.

I look forward to your prompt response.

Sincerely,

George Diamantopoulos

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