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November 29, 2016

Kathleen H. Burgess
Secretary to the Commission
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Case No. 93-G-0932 – Heightened Scrutiny of Precedent Agreements Supported by Affiliates

Dear Secretary Burgess:

We are writing and submitting this letter in Docket No. 93-G-0932 to inform the New York State Public Service Commission (Commission) of issues relating to its review of natural gas supply and transportation agreements, as are routinely filed in this proceeding. As the Commission is aware, regulated natural gas utilities are required to file such agreements, in many instances, so that utilities and the Commission and can fulfill statutory requirements for the filing and review of such agreements.[1] It has come to our attention, that the current practices are no longer sufficient to provide the Commission and interested parties with statutorily required information relevant to such filings and necessary for Commission review.

A new predominant model has emerged regarding the funding of long-term pipeline capacity. As evidenced by several recent certificate applications before the Federal Energy Regulatory Commission, pipeline developers and the regulated utilities contracting for that capacity are increasingly part of the same corporate group. This affiliate relationship raises the concern that a franchised public utility and an affiliate under the same parent company may be able to transact in ways that transfer benefits from the captive customers of the public utility to the affiliate and its shareholders. A long-term consequence of this risk-shifting is that pipeline capacity buildout will undermine drivers for more efficient solutions and impose long-term environmental and economic costs on captive ratepayers.

One example of this recent trend was filed in this docket on February 29, 2016. Specifically, Consolidated Edison Company of New York, Inc. (Con Ed) filed a new pipeline precedent agreement that it entered into with Mountain Valley Pipeline, LLC (MVP). As set forth in the agreement, Con Ed has committed, effective November 1, 2018, to receive from and pay MVP for 250,000 Dt/d of firm transportation service capacity for a term of 20 years. Notably, neither the Con Ed filing, nor the record of this proceeding contain information disclosing that Con Ed is also an owner of the MVP Project. Specifically, Con Edison Gas Midstream, LLC (later renamed Con Edison Gas Pipeline and Storage, LLC), a subsidiary of Consolidated Edison, Inc., acquired a 12.5% ownership interest in Mountain Valley Pipeline, LLC in January 2016 at the

[1] *See* Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Opinion No. 94-26, Case No. 93-G-0932 (December 20, 1994) (discussing the requirement to file service agreements).

same time that its affiliate contracted for transportation service.[2] Thus, Con Ed proposes to obligate customers to pay for a 20-year transportation contract, while an affiliate takes a proportionate equity position as MVP developer. This financial construct suggests a shifting of the balance of risks and benefits as between retail ratepayers and Con Ed shareholders which is relevant to the Commission's review of the contract. However, Con Ed did not disclose this affiliate relationship before the Commission when it filed this precedent agreement.

New York statutes and case law establish a strong policy in favor of disclosure and transparency regarding the filing of contracts, including those involving affiliates. Section 110 of the Public Service Law requires that certain contracts with affiliated interests for the purchase of gas first be filed with the Commission.[3] The legislative history of this statute makes clear that the "overriding legislative concern" of Public Service Law Section 110 was to prevent "the utility owners from diverting profits to the owners at the expense of the ratepayers"[4]—the very concern present with Con Ed's MVP transaction. Section 65(5) of the Public Service Law provides that "no . . . classification, schedule, rate or charge shall be lawful unless it shall be filed with and approved by the commission." Case law also discusses the "the unequivocal legislative directive that all rates charged be plainly stated and made available for public review"[5] and the fact that full disclosure of information by regulated companies is essential if regulators are to properly fulfill their duty of regulating in the public interest.[6]

Con Ed's affiliate arrangement raises issues regarding whether this precedent agreement is in fact in the public interest and which extend beyond a more traditional arms-length transportation services agreement between unaffiliated parties. Such affiliate transactions are not in the public interest if the contracting utilities file such agreements without disclosing that their respective counterparty is an affiliated interest. Affiliate transactions should be subject to heightened disclosure requirements, given that the lack of such disclosure could impinge upon the due process rights of interested and potential parties, such as those representing retail customers. These interests are particularly important as ratepayers are the ones bearing cost and risk in excess of benefits so that the utility parent shareholders can earn additional returns. Accordingly, the failure to disclose and provide notice constitutes a material omission

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[2] https://www.coned.com/newsroom/news/pr20160125.asp.

[3] Public Service Law § 110(4) ("All written contracts and all arrangements…including such contracts and arrangements with any affiliated interest…for the purchase of electric energy, gas (natural or manufactured or a mixture of both)…shall first be filed with the commission, and no charge for such electric energy, gas and/or water whether made pursuant to contract or otherwise, shall exceed the just and reasonable charge for such electric energy, gas, and/or water….If it be found that any such contract or arrangement is not in the public interest, the commission, after investigation and hearing, is hereby authorized to disapprove such contract or arrangement"); *see also* Public Service Law § 110(3) (requiring Commission approval of "management, construction, engineering or similar contract").

[4] *In the Matter of New York Telephone Co. v. Pub. Serv. Comm'n of the State of N.Y.*, 530 N.E.2d 843, 848 (N.Y. 1988).

[5] *MCI Telecommunications Corporation v. Public Service Commission*, 169 A.D.2d 143, 145 (3rd Dept. 1991).

[6] *See* Bay State Gas, 2012 WL 5448763 at 62, Mass. DPU Order No. 12-25 at 106 (Nov. 1, 2012) ("full disclosure of information by regulated companies is essential for the Department to properly fulfill its function of regulating in the public interest.").

prejudicing both prospective parties and the Commission in their review of utility contracts with affiliate interests.[7]

For all of these reasons, the Commission should require any utility seeking to enter into any affiliate transaction to provide advance notice to the Commission and obtain Commission approval to initiate negotiations as among affiliates, similar to requirements applied by numerous state public utility commissions.[8] The policy codified in Section 110 of the Public Service Law requiring heightened review procedures is not being effectuated by the current practices in the instant proceeding. EDF urges the Commission to subject affiliate transactions to enhanced scrutiny to ensure that a regulated utility is not imposing long term financial obligations and risk upon retail customers in excess of reasonably foreseeable benefits, while conversely providing utility shareholders with returns in excess of risk. This heightened review will ensure efficient pipeline construction and prevent customers from being burdened by excessive costs, objectives once advocated by Con Ed itself.[9]

Sincerely,

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cc: Parties in Case No. 93-G-0932

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7 EDF reserves all rights and remedies provided by law or at equity with respect to Con Ed's MVP affiliate precedent agreement, including in any future proceeding.

8 *See, e.g.*, State of North Carolina Utilities Commission, *Order Accepting Affiliated Agreements for Filing and Permitting Operation Thereunder Pursuant to G.S. 62-153 and Authorizing Piedmont to Enter into Related Redelivery Agreements*, Docket No. G-9, Sub 644 (October 28, 2014), *available at* http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=7a65cba3-a7ce-4224-9138-867e5623ed1e.

9 *See* Initial Comments of Consolidated Edison Company of New York, Inc., FERC Docket Nos. RM98-10 and RM98-12 at 2 (April 22, 1999) (emphasizing the objective "to assure that facilities are constructed only where market demand warrants the construction" and "to promote pipeline efficiencies in order to reduce costs borne by consumers").