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05-S-1376  
OGC  
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Corresp.

April 17, 2006

**VIA E-MAIL AND HAND DELIVERY**

Honorable Rafael Epstein  
Administrative Law Judge  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223

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Re: Case 05-S-1376 – Consolidated Edison Company of New York, Inc. – Stearns Rates

Dear Judge Epstein:

Please find enclosed the City of New York's Response to the Motion of Consolidated Edison Company of New York, Inc. to strike a portion of the rebuttal testimony of Dr. Alan Rosenberg. A copy of this letter and the enclosed response have been served on the active parties by E-Mail.

If you have any questions, please contact me at (518) 320-3404.

Very truly yours,

COUCH WHITE, LLP

Robert M. Loughney

RML/MHB/dp

Enclosure

cc: Honorable Jaclyn Brillig (via Hand Delivery w/enc. of 5 copies)  
Active Parties (via E-Mail; w/enc.)

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**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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**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**

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Case 05-S-1376

**RESPONSE OF THE CITY OF NEW YORK  
IN OPPOSITION TO  
MOTION OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.  
TO STRIKE A PORTION OF THE REBUTTAL TESTIMONY  
OF DR. ALAN ROSENBERG**

The City of New York ("City") hereby responds, in opposition, to the motion of Consolidated Edison Company of New York, Inc. ("Con Edison") to strike a portion of the rebuttal testimony of Dr. Alan Rosenberg (the "Motion") in the above-captioned rate proceeding. As demonstrated below, Con Edison's Motion should be denied. The testimony that is the subject of the Motion – namely, page 13, lines 1-6, of Dr. Rosenberg's rebuttal testimony – responds explicitly to direct testimony sponsored herein by New York State Department of Public Service Staff ("Staff") and, therefore, constitutes appropriate rebuttal testimony. Accordingly, for the reasons demonstrated below, Con Edison's Motion should be denied in its entirety.

**BACKGROUND**

On February 24, 2006, Staff submitted its direct testimony in this proceeding. In its testimony, the Staff Rate Panel addressed, among other things, the accounting of costs associated with the East River Repowering Project ("ERRP"). The Staff Rate Panel

recommended that rate year fixed costs associated with the ERRP not be placed in base rates, as Con Edison had proposed, but, rather, that such costs should be recovered through the Fuel Adjustment Clause (“FAC”).<sup>1</sup> The Staff Rate Panel advanced two reasons for its recommendation: (1) the costs of the ERRP have increased significantly since the last rate proceeding and a thorough review of these costs is necessary before they can be allowed in rate base; and (2) the ERRP was not properly allocated in the embedded cost of service study.<sup>2</sup>

On March 13, 2006, Dr. Rosenberg submitted his rebuttal testimony on behalf of the City. In his rebuttal testimony, Dr. Rosenberg directly addressed Staff’s recommendation concerning recovery of ERRP costs through the FAC. In response, Dr. Rosenberg agreed with Staff’s concerns regarding recovery of ERRP costs through base rates, but disagreed with Staff’s proposal as to how such costs should be recovered in this rate proceeding (i.e., through the FAC).<sup>3</sup>

Dr. Rosenberg proceeded to address the flaws inherent in Staff’s cost recovery proposal with respect to the recovery of ERRP costs. Dr. Rosenberg asserted that the proposed recovery of ERRP costs during the rate year through the FAC is problematic because “[i]f the costs of ERRP are excessive, but the costs are still being allowed through the FAC, then customers will still be paying 100% of those costs ... [and] will be paying them in a volumetric fashion, which is contrary to what the Staff is recommending, namely

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<sup>1</sup> Direct Testimony of Staff Rate Panel, p. 5.

<sup>2</sup> Id., p. 4.

<sup>3</sup> Rebuttal Testimony of Dr. Alan Rosenberg, p. 12, lines 9-12.

that they be allocated on peak demand.”<sup>4</sup> Responding further to the Staff Rate Panel’s direct testimony, Dr. Rosenberg countered that the Panel’s first concern (i.e., that ERRP costs are excessive) could be addressed in an alternative manner; to wit: only recovering a fraction of ERRP costs in base rates, with the balance of the costs being held in a deferral account.<sup>5</sup>

**ARGUMENT**

As demonstrated above, the portion of Dr. Rosenberg’s rebuttal testimony at issue in the Motion responds specifically to the testimony and recommendations of the Staff Rate Panel. Dr. Rosenberg: (1) agreed with concerns advanced by Staff; (2) disagreed with the cost recovery proposal that was advanced by Staff as a means of addressing its concerns; (3) identified flaws inherent in Staff’s proposal; and (4) recommended a modification to Staff’s cost recovery proposal that better addresses Staff’s stated concerns, but which is not flawed in the manner that he identified. Thus, Dr. Rosenberg’s rebuttal testimony at issue constitutes proper rebuttal because it is responsive to Staff’s direct testimony. The need for Dr. Rosenberg to rebut and advance an alternative to Staff’s recommended cost recovery proposal – which differs materially from what Con Edison has proposed – could not have been anticipated at the time the City submitted its direct testimony in this proceeding.

In its Motion, Con Edison argues that Dr. Rosenberg is not really responding to Staff testimony when he addresses the recovery of ERRP costs in his rebuttal testimony. For instance, Con Edison asserts that Staff’s direct testimony “did not challenge the

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<sup>4</sup> Id., p. 12, lines 16-20.

<sup>5</sup> Id., p. 13, lines 1-6.

Company's position that it should be entitled to full cost recovery in the rate year."<sup>6</sup> Con Edison also refers to "Staff testimony that did not challenge the Company's proposal for full recovery."<sup>7</sup> Con Edison's assertions potentially are misleading. The Staff Rate Panel did in fact raise the issue of ERRP cost recovery in its direct testimony. That Panel testified that: (1) "the cost of ERRP has increased significantly since the last rate proceeding"; (2) "a thorough review" of ERRP costs is necessary; (3) Con Edison did not "offer any justification of the reasonableness of [ERRP] costs"; (4) due to a delay by Con Edison in providing information, Staff was unable to complete a thorough review of ERRP costs at the time its direct testimony was due; and (5) Con Edison's recovery of ERRP costs should be "subject to refund of any amounts identified by a Staff audit and determined by the Commission to have been improperly recovered."<sup>8</sup> Thus, Staff most certainly raised concerns in its direct testimony regarding Con Edison's recovery of ERRP costs, and such concerns clearly are appropriate subject matter for rebuttal testimony.

In addition to the fact that the challenged testimony constitutes appropriate rebuttal, there are several other reasons why Con Edison's Motion should be denied. First, striking a portion of Dr. Rosenberg's rebuttal testimony would provide the Commission with an incomplete record upon which to resolve the issue of the regulatory treatment that should be accorded to ERRP costs in this proceeding. On a contested issue such as this, where there

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<sup>6</sup> Motion at 2.

<sup>7</sup> Id.

<sup>8</sup> Staff Rate Panel at 4-5.

are at least three different positions being advanced by active parties, the Commission should be provided with as complete a record as possible upon which to base its decision.

Second, striking a portion of Dr. Rosenberg's rebuttal testimony would be highly prejudicial to the City, which could not anticipate that Staff would: (1) raise concerns about the level of ERRP costs that would be incurred in the rate year; (2) advance a cost recovery proposal completely different from what Con Edison had proposed; and (3) advance a cost recovery proposal that, in the opinion of the City's witness, is flawed and does not address adequately Staff's stated concerns. As a major steam customer of Con Edison, the City has a right to advance its position on this issue into the evidentiary record, including the right to respond on rebuttal to unforeseen proposals advanced in Staff's direct testimony.

Finally, denial of the Motion would not cause any material prejudice to Con Edison. The utility similarly was accorded the opportunity on rebuttal to respond to the cost recovery proposal of the Staff Rate Panel. Con Edison also still retains the right to conduct discovery on and cross-examination of Dr. Rosenberg on the challenged portion of his rebuttal testimony, as well as to brief the issue following the hearings.

CONCLUSION

For the foregoing reasons, the challenged portion of Dr. Rosenberg's rebuttal testimony constitutes appropriate subject matter for rebuttal, and Con Edison's Motion should be denied in its entirety.

Dated: April 17, 2006  
Albany, New York

Respectfully submitted,

Robert M. Loughney/mem

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