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December 10, 2014
By Email for Electronic Filing

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

Re: Case 14-M-0523 – Petition of Local 175 of the United Plant and Production Workers Union to Institute a Prudence Proceeding

Dear Secretary Burgess:

Attached for filing is the *Response of Consolidated Edison Company of New York, Inc. to the Petition of Local 175 of the United Plant and Production Workers Union* in the referenced proceeding.

Very truly yours,

Attachment

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Local 175 of the United Plant and Production Workers Union to Institute a Prudence Proceeding to Review Certain Practices of the Construction Programs of Consolidated Edison Company of New York, or in the alternative, to request that the Commission issue a Declaratory Ruling pursuant to section 204 of the State Administrative Procedure Act.)

Case No. 14-M-0523

RESPONSE OF
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
TO THE PETITION OF LOCAL 175 OF THE
UNITED PLANT AND PRODUCTION WORKERS UNION

Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company") hereby responds to the petition filed by Local 175 of the United Plant and Production Workers Union ("Local 175") on December 2, 2014 ("Petition"), requesting the Public Service Commission ("Commission") to:

1. "institute a proceeding pertaining to the prudence of [Con Edison's] newly adopted policy to exclude construction contractors from bidding on Con Edison work if they have not signed collective bargaining agreements with designated labor unions," or, in the alternative,

2. "issue a declaratory ruling, pursuant to § 204 of the State Administrative Procedure Act (SAPA), to the effect that Con Ed's actions and policy can and should be prohibited pursuant to § 65 (1) of the Public Service Law."

In fact, what Local 175 seeks is to involve the Commission in what is fundamentally a labor "turf war" between it and another union, Local 1010, Laborers International Union of North America ("Local 1010"). However, as is set out in more detail below, it is not the province of the Commission to intervene in such matters, which fall within the exclusive jurisdiction of the National Labor Relations Board. The Commission, consistent with its practice

and policy, should not intervene in this labor relations matter. Furthermore, as explained below, the Petitioner's claims are groundless with regard to the Company's contracting practices, which do not raise any issues that warrant a prudence inquiry by the Commission.

STATEMENT OF FACTS

Con Edison routinely engages in construction work that involves asphalt paving as a component of construction. For the last several decades, Con Edison has included in its Standard Terms and Conditions for Construction Contracts that, "With respect to Work ordered for Con Edison, unless otherwise agreed to by Con Edison, Contractor shall employ on Work at the construction site only union labor from building trades locals having jurisdiction over the Work to the extent such labor is available." The "building trades locals" are generally those local unions that belong to the Building & Construction Trades Council of Greater New York ("Building & Construction Trades Council"), an organization which, among other things, helps resolve jurisdictional disputes between and among its member labor organizations

Typically, asphalt paving work is performed by contractors, involving excavation (removal of existing pavement, digging a trench to the required depth, and then, after necessary work has been performed, refilling the trench); frequently using heavy equipment such as a back hoe; carting away the debris and carting in fresh fill; and repaving the site. Historically, the excavation work is, and has been, performed by employees represented by Local 731, Laborers International Union of North America; the operation of the heavy equipment is, and has been, performed by employees represented by Local 15, International Union of Operating Engineers; the carting work is, and has been, performed by employees represented by Local 282, International Brotherhood of Teamsters; and the paving work is, and has been, performed by

employees represented by Local 1010, or its predecessor sister local, Local 1018. Locals 731, 15, 282 and 1010/1018 are affiliated with the Building & Construction Trades Council.

Of late, Con Edison became aware of the fact that certain of its paving contractors were using employees represented by Local 175 in several of the trades involved in asphalt paving – including not only the paving itself, historically and currently within the jurisdiction of Local 1010, but also the excavation work within the trade union jurisdiction of Local 731, and perhaps also the heavy equipment work within the jurisdiction of Local 15.

Concerned that efforts by Local 175 to extend its asserted trade union jurisdiction could embroil Con Edison's contractors into disputes for work over which other labor organizations currently have jurisdiction, Con Edison recently clarified its Standard Terms and Conditions for Construction Contracts to provide: "With respect to Work ordered for Con Edison, unless otherwise agreed to by Con Edison, Contractor shall employ on Work at the construction site only union from building trades locals *(affiliated with the Building & Construction Trades Council of Greater New York)* having jurisdiction over the Work to the extent such labor is available." [Emphasis added]

Internecine disputes between and among labor organizations, such as that between Local 175 and Local 1010 regarding repaving, and as may emerge to the extent that Local 175 seeks to extend its asserted trade union jurisdiction into other trades like excavation and heavy equipment work, have the potential to disrupt and delay the work of contractors retained by the Company. Those delays are potentially costly to the contractors, Con Edison, and, ultimately, its stakeholders and customers, and could subject Con Edison as the holder of permits to open streets for such construction work to the risk of penalties from the New York City Department of

Transportation for failure to comply with the time limits for completion of the work set forth in the permits.

Con Edison's amendment of its Standard Terms and Conditions for Construction Contracts both reiterates the Company's long-standing policy and practice to require that contractors performing construction work for Con Edison utilize workers represented by building trades locals having jurisdiction over the work; and clarifies that the historical trade council of such workers and arena for determining trade union jurisdictional disputes is the Building & Construction Trades Council of Greater New York.

There is no question that Local 1010 is currently the building trades local having trade union jurisdiction over paving work. Indeed, the New York City Comptroller, in setting the prevailing wage for pavers in New York City pursuant to Labor Law §220, uses the wage rates established in the collective bargaining agreements negotiated by Local 1010, not the higher rates negotiated by Local 175. *See, e.g. New York Independent Contractors Alliance v. Liu*, 43 Misc.3d 443, 981 N.Y.S.2d 246 (Sup. Ct., NY Co., 2013); *Local 175 v. Thompson*, 28 Misc.3d 283 (Sup. Ct., NY Co., 2010) (both of these cases involved actions by Local 175 challenging the fact that the Comptroller set the prevailing wage for pavers based on the Local 1010 collective bargaining agreements). Local 175 is, by contrast, a Plant and Production Workers Union, representing as it does, landscapers, yard workers, mechanics, recycling employees, and other workers outside of the building trades, and, unlike Local 1010, is affiliated with an international union that initially represented horseshoers, and now represents primarily service employees rather than building trades employees. *See International Union of Journeymen Horseshoers v. American Fed. Of Labor & Congress of Industrial Orgs.*, 2004 WL 3362704 (E.D.N.Y. Dkt. No. 03-cv-6070 (ARR)(KAM), Aug. 9, 2004).

THE COMMISSION SHOULD FOLLOW ITS LONGSTANDING PRECEDENT OF NON-INTERVENTION IN LABOR RELATIONS MATTERS

Clearly, there can be no dispute that the issue into which Local 175 seeks to have the Commission intervene is fundamentally a labor relations question. Indeed, Local 175 essentially conceded that fact when it filed an unfair labor practice charge at the National Labor Relations Board alleging that Con Edison's action with regard to paving contractors violated the National Labor Relations Act. (See Petition, page 2 and exhibit 1.) In *Building Trades Council (San Diego) v. Garmon*, 359 U.S. 236 (1959), the Supreme Court stated that:

> It is essential to the administration of the [National Labor Relations] Act that these determinations [of whether conduct violates the NLRA] be left in the first instance to the National Labor Relations Board . . . . When an activity is arguably subject to §7 or §8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with National labor policy is to be averted.

Id. at 244-45.

Having placed the issue squarely before the NLRB, Local 175 is precluded from arguing that this dispute is not one that should, in the first instance, be left to that agency. Consistent with the Garmon pre-emption doctrine, the Commission must defer to the NLRB and dismiss this Petition. Indeed, Local 175 essentially concedes in its own Petition that the Commission does not have jurisdiction to make a determination as to whether the policies of Con Edison violate the NLRA, federal antitrust laws, state statues or common law. Petition at 8-9.

The Commission has, consistent with federal law, historically declined to intervene in labor relations matters. The Commission's policy reflects its limited authority and its policy of neutrality on labor relations issues. In Case 01-M-0075, Joint Petition of Niagara Mohawk Holdings, et al., *Order Dismissing Petition* (issued January 31, 2003) page 5, the Commission said,

> Although the Union would characterize the issues raised by its petition as arising under the Joint Proposal . . . the issues in fact relate to labor relations matters over which our authority is limited. Moreover, . . .the specific relief sought . . . would interject us into the collective bargaining process in a manner we have, for good reason, historically avoided."[1]

In Case 07-E-0949, Re Orange and Rockland Utilities, *Order Establishing a Three-Year Rate Plan* (issued July 23, 2008), page 79, the Commission stated, "The Commission's longstanding policy is to remain neutral concerning disputes between any utility and those who work for it."

In Case 11-M-0237, Petition of Transport Workers Union of America, Local 101 - Utility Division for Investigation of National Grid's Proposed Changed to the One Call Damage Prevention Dispatching Process, *Order Denying Petition* (issued July 16, 2012), the Commission said:

> While the Union would characterize the modification of the Company's One-call process as a public safety issue, it is clear from the record before us that this is a labor relations matter. … It is our long-standing policy that the amount and type of labor a regulated utility needs is decided in the first instance by the utility, subject to its obligation to provide safe and adequate service at a reasonable cost.[2]

Local 175's characterization of Con Edison's amendment of its terms and conditions for construction contractor contracts as having adverse rate impacts on customers is a specious

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[1] In fact, the Commission has referred to this practice as its "venerable policy of non-intervention in collective bargaining matters." Case 01-M-0075, Joint Petition of Niagara Mohawk Holdings, et al., *Order Denying Petition for Reconsideration* (issued April 16, 2003), page 4. The Commission's policy of non-interference in labor relations is most frequently encountered in matters pertaining to a utility's internal unionized workforce. The dispute in the instant matter arises from an external Union's claim that Con Edison's contractual conditions might be anticompetitive in nature, and costly to its customers. These unsupported assertions are even more remote to the Commission's authority than internal employees making arguments regarding their collective bargaining agreements.

[2] See also, Rochester Gas and Elec. Corp. v. Public Service Commission, 64 A.D.2d 345, 348, 410 N.Y.S.2d 142, 144 (Third Dept. 1978), in which the Court quotes from a Commission order issued January 20, 1978, as follows:

> Our decision to follow this procedure in no way affects the freedom of the company management or its employees with respect to labor relations and was clearly not intended to coerce the company and its employees to become unionized as RG&E contends.

attempt to recast what is purely an external labor relations matter, within the purview of the NLRB. Moreover, Local 175's accusation of weak internal controls at the Company mischaracterizes the purpose of the relevant Company contractual provision. On the contrary, the Company's effort to avoid future impacts of trade union disputes on the efficient and timely completion of construction work is proactive risk mitigation and demonstrates effective controls.

Further, Local 175's claim that it represents lower costs for customers of Con Edison is belied by the fact that Local 175's wage rates are actually higher than those negotiated by Local 1010, as demonstrated by Local 175's repeated efforts to have the Comptroller revise its determination of the prevailing wage rate for pavers. *See, e.g. New York Independent Contractors Alliance v. Liu, supra*; *Local 175 v. Thompson, supra.* Local 175 acknowledges that fact in its Petition (at page 6, "[Local] 175 has negotiated a higher wage scale, better benefits ….").

As an alternative to instituting a proceeding, Local 175 requests that the Commission issue a declaratory ruling "that Con Ed's actions and policy can and should be prohibited pursuant to §65(1) of the Public Service Law." Part 8 of the Commission's rules (16 NYCRR Section 8) states in part that the Commission may issue a declaratory ruling with respect to the applicability of a rule or statute enforceable by the Commission or whenever the Commission determines it is warranted by the public interest. Local 175 appears to argue that the Company's "actions and policy" violates the "just and reasonable" rate provision of PSL §65(1) by increasing costs related to construction costs, legal fees, and potential liability. A declaratory ruling to address these assertions is inapposite. The reasonableness of requests by the Company to include construction or other business expenditures in rates is examined through a well-established forecast and review process conducted in rate case proceedings. Review of such

asserted expenditures in the guise of a declaratory ruling would be speculative, premature, and inconsistent with Commission practice.

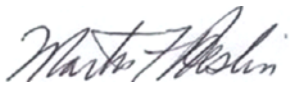
The Commission, consistent with its practice and policy, should not intervene in this labor relations matter.

CONCLUSION

For the foregoing reasons, Con Edison respectfully requests that the Commission find there to be no reasonable basis for initiating an investigation of the Company's terms and conditions relating to construction contractor contracts. The Commission should therefore deny in its entirety, the relief requested by the Local 175.

Dated: December 10, 2014
New York, New York

Respectfully submitted,



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