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Cc: Paul Agresta

Subject: Re: Cases 13-E-0030, 13-G-0031, 13-S-0032 -- Ruling on Discovery Dispute

Date: 05/07/2013 12:31 PM

This is a follow-up to our May 2, 2013 e-mail ruling in these proceedings. We have considered and are not persuaded by the assertion of Consolidated Edison Company of New York, Inc. (Con Edison) that, by providing the inventory log described in our prior ruling, it will forfeit some portion of the claimed privilege. A distinction exists between acknowledging the existence of a document and disclosing the contents thereof. Ordinarily, a list identifying documents for which a privilege is asserted is discoverable and, indeed, an appropriate tool to be used in the resolution of discovery disputes. *See* CPLR 3122(b) (providing that a person who is required by subpoena or order to produce documents but is asserting a privilege must indicate the legal ground for withholding each such document and provide the type, general subject matter, and date of each document withheld unless "divulgence of such information would cause disclosure of the allegedly privileged information").

Here, the asserted basis of the privilege is to encourage utilities to perform honest and vigorous internal audits and investigations. We discern no reason why the mere identification of documents related to those efforts, without disclosing internal content, would in any way undermine a utility's incentive to perform effective internal self-evaluations. Con Edison has control over what it divulges in identifying the documents and we believe is capable of using appropriate discretion. Con Edison has, in fact, readily acknowledged that it has undertaken such assessments, rendering the existence of the disputed information a non-issue. Further, we believe that the inventory log will enable us to more effectively determine the areas of dispute and more quickly resolve the issues so as to not further delay this proceeding.

Within the parties' submissions, a sub-issue emerged related to the scope of the two interrogatories in dispute. Whereas Con Edison states that it interprets the disputed discovery requests of the Utility Workers Union of America, Local 1-2 (UWUA) as pertaining only to self-assessments, UWUA asserts that it is seeking all internal documents prepared in relation to Con Edison's preparation for, and response to, Hurricane Sandy. Con Edison objects to this broader interpretation, arguing that because there are other proceedings pending before the Commission which focus on Sandy, exploration of those issues in the context of this proceeding is premature. We disagree. Given the significant issues in this proceeding regarding storm hardening costs which were triggered, at least in great part, by Sandy, we find the requested information may be relevant here. Con Edison is, of course, free to make specific objections-–and to include such objections in its brief--to the

disclosure of any particular information as overly burdensome, irrelevant or for other appropriate grounds.

Accordingly, we direct the parties to proceed as directed in our May 2, 2013 e-mail ruling.

Paul Agresta
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