

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 16, 2011

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca

CASE 11-G-0077 - Proceeding on Motion of the Commission to Investigate Whether a Penalty Should be Imposed on Consolidated Edison Company of New York, Inc. Concerning the Natural Gas Explosion on July 25, 2008, at 147-25 Sanford Avenue, Queens.

ORDER APPROVING SETTLEMENT

(Issued and Effective June 17, 2011)

BY THE COMMISSION:

INTRODUCTION

In this order, we approve and adopt a settlement agreement (Agreement) submitted by Staff (Staff) of the Department of Public Service (Department) and Consolidated Edison Company of New York, Inc. (Con Edison or the Company). We find that the Agreement appropriately resolves the penalty-related issues raised in our Order to Show Cause issued in this proceeding on March 17, 2011.¹ We exercise our discretion to accept the Agreement in lieu of bringing a penalty action after considering the benefits of the Agreement relative to litigation. The Order to Show Cause identified potential penalties of \$950,000 and the Agreement provides for a ratepayer credit of

¹ Case 11-G-0077, Order To Show Cause Why a Penalty Should Not Be Imposed (issued March 17, 2011).

\$1.5 million (*i.e.*, the potential penalty amount plus the tax effects).

BACKGROUND

The Gas Explosion and Investigation

On July 25, 2008, a natural gas explosion occurred at an apartment building located at 147-25 Sanford Avenue, Queens, New York (Gas Incident), in the service territory of Con Edison. The explosion destroyed portions of the building and injured several individuals, including serious injury to two occupants of Apartment 2P, and ultimately resulted in the death of the adult occupant of Apartment 2P. The explosion took place soon after Con Edison and Liberty Plumbing and Heating, Inc. (Liberty) (plumbers hired by the building owner)² had left the premises, after restoring gas service to seven "risers"³ inside the building. The explosion occurred in Apartment 2P, which is served by riser P.

The Staff of the Safety Section of the Department's Office of Electric, Gas & Water investigated the incident and prepared a report dated April 2009 (Report). The Report concluded Con Edison had failed to follow its procedures in several respects when restoring gas service.⁴ Specifically, the Report determined

² Liberty is a defendant with Con Edison in several consolidated personal injury civil lawsuits that arose out of the Gas Incident, and which are currently pending in Supreme Court, Queens County. In the separate and distinct Commission-initiated proceeding, Liberty was granted certain limited intervenor rights, by an April 1, 2011 Ruling of the Secretary.

³ A riser is piping beyond the customer's meter inside a building serving individual apartments.

⁴ Con Edison Procedure: G-11836-9, Gas Operations Standards, "Meter Turn-on and Turn-off for: Meter Changes, New Meter Sets and When Restoring Gas Service Inside Buildings After Meter/Service Has Been Turned Off," (Effective Date February 9, 2007).

that Con Edison employees failed to follow G-11836-9 by: (i) not performing the piping system bleeds during the gas system integrity test, Report at 19; G-11836-9, §4.5 and §11.3; (ii) not "gassing-in" at least one appliance per riser, Report at 19; G-11836, §§4.6 and 11.5; (iii) proceeding with restoring gas service to risers G, M and P despite conditions in apartments (e.g., the absence of installed appliance valves) that contradicted the Company's procedure and the plumbers' Gas Turn-On affidavits, Report at 17-18, and 19; (G-11836-9, §§11.4(E) & 11.6); and, (iv) restoring gas service for all risers without receiving integrity test affidavits, Report at 8-9, 17-18; G-11836-9, §11.4(b). The Report (at 20-22) further explained that Con Edison revised G-11836, and its training curriculum, following the Gas Incident. One of the revisions to the procedures required that gas service be restored on a riser-by-riser basis to reduce the length of time between the completion of an integrity test and the turning on of gas in a particular riser.⁵

The Order to Show Cause

After further investigation by Department Staff, including staff of the Office of General Counsel, we issued, on March 17, 2011, an Order To Show Cause Why A Penalty Should Not Be Imposed in this case (Order to Show Cause). The Order to Show Cause explained that non-compliance with the Company's written gas turn-on and restoration procedures constituted violations of the Public Service Law (PSL) §§5 and 65 mandating safe and

⁵ The Report is located on the Commission's website in Case 11-G-0077.

adequate service, a Commission regulation, 16 NYCRR 255.603(d),⁶ and Commission precedent.⁷

The Order to Show Cause required Con Edison to show cause why a penalty action should not be commenced against the Company pursuant to PSL §25(2), for Con Edison's failure to comply with procedures required by a Commission order and the PSL, and for the Company's failure to comply with the Commission's regulation, codified at 16 NYCRR §255.603(d). More specifically, the Order to Show Cause identified seven distinct violations of G-11836-9, the procedures mandated by our Ashburton Order. Such violations could, if successfully litigated, potentially result in a total penalty award, under PSL §25(2), of \$700,000 from New York State Supreme Court.

The Order to Show Cause also required Con Edison to explain why the Commission should not seek an enhanced penalty of \$250,000, pursuant to PSL §25(3), based on a Commission determination that Con Edison's non-compliance with G-11836-9

⁶ That regulation requires:

- (d) Each operator shall satisfactorily conform with the program submitted.

The program referred to is described in §255.603(b), which requires:

- (b) Each operator shall prepare and file a detailed written operating and maintenance plan for complying with all the provisions of this Part...

Con Edison's operating and maintenance plan includes G-11836-9, and therefore, its failure to follow G-11836-9 violates our mandate under §255.603(d).

⁷ Case 15686, Explosion and Fire at 188 Ashburton Avenue, Yonkers, New York on October 22, 1979, Untitled Order (issued December 27, 1979)(Ashburton Order). Con Edison's procedure G-11836 was promulgated pursuant to the requirements of the Commission's Ashburton Order. G-11835-9, at §2.0. Those procedures establish standards for safely restoring gas service in buildings, including multi-dwelling buildings.

caused or constituted a contributing factor in bringing about a death or personal injury. Thus, if the alleged violations were successfully litigated in a civil penalty action in Supreme Court pursuant to PSL §§25(2) and 25(3), and the Court was persuaded to award the maximum penalties that could be assessed against the Company, the total amount would equal \$950,000.

On March 18, 2011, Liberty sought active-party intervenor status in this case. In a letter-ruling dated April 1, 2011 the Secretary granted Liberty limited intervenor rights.⁸ The Secretary stated that "Liberty's participation will be limited to responding to the Commission's [Order to Show Cause] consistent with the time parameters set forth therein, and receiving copies of documents and filings and providing comments, as appropriate under the Commission's Rules and Regulations."

By letter filed April 8, 2011, Con Edison stated that it and Staff were exploring the potential to resolve the issues that were raised in the Order to Show Cause, and requested an extension to file its response to the Order to Show Cause from April 18, 2011 to May 2, 2011. By letter filed April 11, 2011, Liberty requested: i) additional time to respond, if Con Edison's extension request was granted; and ii) that any settlement negotiations between Staff and the Company be held in abeyance pending receipt of all submissions of the parties, including Liberty.

By Ruling dated April 12, 2011, the Secretary granted limited extensions, because the time for filing a penalty action against Con Edison would run as of July 25, 2011. The Secretary

⁸ The April 1, 2011 letter-ruling observed that "whether to bring a penalty action, as well as the decision to state claims against a regulated entity, and any corresponding penalty amounts sought, are within the Commission's discretionary authority."

allowed Con Edison until April 29, 2011 to respond to the Order to Show Cause and reply to Liberty's April 18, 2011 response to the Order to Show Cause. Liberty was allowed until May 6, 2011 to reply to Con Edison's response to the Order to Show Cause.

On April 18, 2011, Liberty submitted a Memorandum of Law, and voluminous documents, including thousands of pages of deposition transcripts and exhibits, from the above-mentioned civil litigation. On April 29, 2011, Con Edison filed its response to the Order to Show Cause and its reply to Liberty's April 18, 2011 filings. On May 6, 2011, Liberty requested an extension of time to file its Reply to Con Edison on the ground that the transcript of a deposition had not yet been finalized.

By a letter-ruling dated May 9, 2011, the Secretary allowed Liberty until May 13, 2011 to file the deposition transcripts in question, but otherwise denied the request. By e-mail request dated May 9, 2011, Liberty requested reconsideration, which was denied on May 10, 2011. The Secretary denied that request, in part, because Liberty did not explain why the unavailability of the finalized deposition transcript prevented Liberty from timely filing its Reply. On May 13, 2011, Liberty filed a copy of the transcripts in question.

Based on the Order to Show Cause, and the filings of Con Edison and Liberty, Staff and Con Edison explored a settlement of the penalty-related issues raised in this proceeding. These discussions culminated with the Agreement executed by Staff and the Company. Pursuant to the Secretary's letter-ruling limiting Liberty's intervention, Liberty was not given formal notice of, and was not given an opportunity to participate in, the settlement negotiations between Staff and Con Edison.

On May 20, 2011, Staff filed the Agreement and a Statement in Support. On that same date, Con Edison filed a

Statement in Support. On May 20, 2011, the Secretary issued a formal notice scheduling a comment period on the Agreement, giving Liberty until May 27, 2011, to present its views to the Commission.⁹ The notice also allowed Staff, and Con Edison, until June 3, 2011 to file a reply to any such filings.

On May 27, 2011, Liberty filed its objection to the settlement (Objection). Staff and Con Edison filed replies on June 3, 2011.

THE AGREEMENT

The Agreement is for "resolution of the penalty-related issues raised in connection with the investigation of the [Department] relating to the July 25, 2008 natural gas explosion that occurred at 147-25 Sanford Avenue, Queens, New York ("Gas Incident")...."¹⁰ Under the Agreement, Con Edison would establish a regulatory liability (or deferred credit) in the amount of \$1,500,000, or approximately 150% of the total amount (i.e., \$950,000) of potential civil penalties for the seven alleged violations identified in the Order to Show Cause. The \$1,500,000 settlement amount is designed and intended to capture, for ratepayer benefit, the pre-tax equivalent of the \$950,000 in total potential penalties identified in the Order to Show Cause. Thus, under the Agreement, Con Edison's shareholders will be responsible for \$1,500,000 and the Company will not seek recovery of this expense from ratepayers. The deferred credit would be established upon the Commission's adoption of the Agreement.

Unless the Commission requires Con Edison to use the \$1,500,000 immediately for a specific stated purpose, the regulatory liability would accrue interest, from the date of a Commission Order adopting the Agreement, and at a rate equal to

⁹ Case 11-G-0077, Notice Scheduling Comment Period (issued May 20, 2011).

¹⁰ Agreement at 1.

the Other Customer-Provided Capital Rate, which the Commission publishes annually. Additionally, Con Edison would exclude the charges to income associated with any amortization of the regulatory liability and related interest from the computation and disposition of earnings required in the Company's current and subsequent gas rate plans.

In exchange for Con Edison's payment, described above, the Commission would agree to "not institute or cause to be instituted against Con Edison, its directors, its officers or its employees a penalty action under the Public Service Law, or under any other statute or regulation or Commission order, with respect to Con Edison's actions, inactions or practices, up to the date of [the] Agreement, directly or indirectly related to the Gas Incident."¹¹ It further provides that the Agreement "is not, and should in no way be construed as, an admission by Con Edison, or upon adoption by the Commission, a finding of fact, or a finding of any violation by Con Edison of any law, regulation, or order of the Commission,"¹² and should not "be construed as a penalty of any kind."¹³

The Agreement is entirely silent, and without legal effect, on the question of whether Con Edison violated its procedures, and on the question of whether Con Edison could be subject to penalties under the Public Service Law. By approving the Agreement, the Commission is not making any finding of fact, or law, with respect to the Gas Incident. Thus, the Agreement has no legal effect whatsoever on the separate civil lawsuits currently pending in Supreme Court, Queens County.

¹¹ Agreement at 2-3, ¶3.

¹² Agreement at 3.

¹³ Agreement at 3, ¶4.

THE STATEMENTS IN SUPPORT, AND
OPPOSITION TO, THE AGREEMENT

Con Edison's statement in support of the Agreement argues it is supported by normally adversarial parties, gives consideration to interests of customers, and provides an outcome within the range of fully litigated outcomes.¹⁴ It asserts the Agreement reflects a substantial effort to address all issues raised in the Order to Show Cause, is based on the Company's assessment of litigation risks, the scope of potential penalties, the burden and costs of litigating, and the potential for litigation to distract from the utility's operations.¹⁵ Con Edison also notes it implemented changes to its operating procedures as a result of the investigations performed by the Company and Staff.¹⁶ Con Edison asserts the Agreement is reasonable in light of the complex issues involved, and given that, if the matter were litigated, Con Edison would present evidence showing its decisions and actions were reasonable, and not inconsistent with applicable procedures, under all the circumstances.¹⁷

Staff's statement in support describes the Agreement as a reasonable and acceptable resolution of issues raised in the Order to Show Cause.¹⁸ Staff asserts the Agreement provides an outcome superior to the potential litigated outcome because the \$1,500,000 regulatory liability is more than 50% greater than the total potential penalty amount identified in the Order to Show Cause. This ratepayer benefit, Staff asserts, will be achieved

¹⁴ Con Ed Statement, at p. 1.

¹⁵ Con Ed Statement, at pp. 3-4.

¹⁶ Con Edison Statement at p. 4.

¹⁷ Id.

¹⁸ Staff Statement in Support, at p. 1.

without litigation risk. Moreover, Staff states that, unlike any civil penalty recovered from litigating a penalty action, the deferred credit established under the Agreement provides a direct benefit to ratepayers. Staff also asserts the settlement will conserve Department of Public Service resources that would otherwise have to be expended in the litigation of a contentious penalty action.¹⁹ Additionally, Staff notes that concerns about the safety of Con Edison's gas operations have been addressed by modifications made to Con Edison's gas procedures, and its employee training curriculum.²⁰

Anticipating Liberty's opposition, Staff asserts the Agreement will not interfere with or frustrate Liberty's ability to prosecute or defend itself against claims in the separate civil litigation that arose out of the Gas Incident.²¹ It notes that the Plaintiffs in the pending personal injury civil actions are not opposing the Agreement, and have not intervened in this proceeding.²² Staff points out that the purposes of this administrative proceeding (and any penalty action brought by the Commission under the Public Service Law) are separate and distinct from the personal injury lawsuits. Through this proceeding, the Commission enforces its regulatory framework, aims to deter violations of Commission-mandated gas safety procedures, and seeks to protect and benefit ratepayers.²³ Staff

¹⁹ Staff Statement in Support, at p. 6.

²⁰ Staff Statement in Support, at pp. 6-7.

²¹ Staff Statement in Support, at p. 7 ("Nothing in this Agreement interferes or frustrates the claims that are pending in the personal injury lawsuits.").

²² Staff Statement in Support, at p. 7 & n. 9.

²³ Staff Statement in Support, at p. 7.

asserts that the changes to Con Edison's procedures, and the terms of the Agreement, achieve these purposes.²⁴

In its Objection, Liberty first raises a procedural objection. It asserts the Agreement was executed in violation of the Commission's regulations, 16 NYCRR §3.9, because Con Edison did not file a "notice of impending negotiation" with the Secretary. It argues that because of this, "Liberty...was not given requisite notice or an opportunity to participate in the discussions leading to the agreement."²⁵ Liberty also asserts that the regulation required notice of settlement negotiations to be given to each of the plaintiffs and defendants in the separate civil litigation currently pending in Queens County Supreme Court, because they were persons reasonably known to have an interest in the outcome of the settlement negotiations. This is so, Liberty asserts, because any Commission decision on whether to settle this enforcement case, or instead commence and prosecute a penalty action against Con Edison, "has a direct impact on the underlying litigation." Liberty argues any penalty assessed against Con Edison would be admissible in the civil litigation as evidence of Con Edison's wrongdoing.²⁶ According to Liberty, by failing to provide such notice, Con Edison "has deprived Liberty ... the opportunity to be heard as to whether the...Agreement is in the interest of all parties."²⁷

Liberty next argues that judicial review "would be appropriate" in the event of any Commission decision to settle, rather than prosecute, this penalty proceeding. Acknowledging that such enforcement decisions are presumptively unreviewable, Liberty argues this presumption is rebuttable if "the substantive

²⁴ Staff Statement in Support, at pp. 7-8.

²⁵ Objection, at p. 2.

²⁶ Objection, at p. 3.

²⁷ Objection, at p. 4.

statute has provided guidelines for the agency to follow in exercising its enforcement powers."²⁸ In this case, Liberty argues, the Commission's regulations provide the statutory standards needed to rebut the presumption against judicial review.²⁹

Liberty also proffers alleged "underlying facts" which, it argues, merit a full Commission hearing and a penalty action against Con Edison. In the main, these facts are the ones stated in the Order to Show Cause.³⁰ Liberty notes that Con Edison did not insist on strict compliance with the affidavit requirement of the turn-on procedure, one of the bases for a penalty identified in the Order to Show Cause. However, Liberty alleges an additional basis for a penalty, alleging Con Edison violated its procedures because it "failed to perform any 'gas outs' of the lines tested the date of the explosion...."³¹ Based on testimony of one of its own employees, Liberty asserts that, had Con Edison "gassed-out" the stove in apartment 6P, it "would have discovered an open valve in Apartment 2P...."³² Thus, Liberty purportedly asserts additional grounds for penalties against Con Edison, under both PSL 25(2) and 25(3), based on Con Edison's failure to "gas-out" the P riser.

Liberty further raises some criticisms of the Staff investigation with respect to responsibility for the open valve

²⁸ Objection, at 5. Liberty cites to a Federal District Court decision, M&T Mortg. Corp. v. White, 2006 U.S. Dist. LEXIS 1903, for the proposition that the presumption against judicial review may be rebutted if "there are statutory standards by which a court may review the withholding of an agency action." Objection, at p. 5.

²⁹ Objection, at p. 5.

³⁰ Objection at pp. 6-7, ¶¶1-4, 8.

³¹ Objection, at p. 6, ¶5.

³² Objection, at p. 6, ¶5.

in Apartment 2P. It claims that Staff should not have accepted Con Edison's story that the bleed of the P riser was attempted from Apartment 1P.³³ Liberty asserts that Staff was unaware that a Con Edison employee initially stated to the New York City Fire Department that he attempted to perform the bleed in Apartment 3P, but then with other employees recanted this story, claiming they were not involved in bleeding the P riser or the other two of the last three risers bled.³⁴

Finally, Liberty claims Con Edison manipulated the Staff investigation. It asserts Con Edison attempted to focus Staff on the condition of gas valves and hoses irrelevant to the open valve in Apartment 2P.³⁵ Liberty also claims Con Edison diverted Staff's attention from the actions of Con Edison employees.³⁶ It further asserts Con Edison's consultant persuaded Staff to remove a conclusion in a draft of the Staff Report, relating to whether Con Edison's violations caused or contributed to the Gas Incident.³⁷

The Replies to Liberty's Objection

In a Reply to Liberty's objection, filed June 3, 2011, Staff argues the Commission should view both Con Edison's and Liberty's filings in light of their competing interests in the civil litigation. As co-defendants in those civil cases, Liberty seeks to shift blame onto Con Edison, and Con Edison seeks to shift blame onto Liberty. Staff argues that, at this stage, there remain open questions of fact as to how and who caused the Gas Incident. Such questions of causation, Staff asserts, need

³³ Objection, at p. 7, ¶6.

³⁴ Objection, at pp. 7-8, ¶¶10, 13.

³⁵ Objection, at p. 7, ¶8.

³⁶ Objection, at pp. 8-9, ¶14.

³⁷ Objection, at p. 9, ¶16.

not be definitively answered in this administrative proceeding before approving the Agreement. Such questions can still be litigated in the civil actions, even if the Commission approves the Agreement. Staff next argues that, despite such open questions relating to causation, there remains a strong case that Con Edison did not follow its procedures in violation of the Ashburton Order, the Public Service Law and Commission regulations. Staff further notes that the settlement amount of \$1,500,000 is 50% greater than what a court could order in a penalty action based on the Order to Show Cause.

Staff asserts that Liberty's objections that the settlement of proposed penalty actions does not adequately deter utilities from violating gas safety standards is not a valid objection to a settlement in excess of available penalties, but instead a call for Legislative action for higher penalties. Given that the settlement amount exceeds the total penalties available under the Public Service Law, Staff argues Liberty has not provided any practical or legal basis for rejecting the Agreement.

Because the decision on whether to bring a penalty action under PSL Section 25 is discretionary, Staff argues, the Commission's settlement notice requirements, under 16 NYCRR §3.9, do not apply. That notice requirement applies to rulemakings and adjudicatory proceedings, and does not apply to an investigatory proceeding intended to adduce information that will inform the Commission's exercise of discretion on whether to seek penalties.

Staff observes that Liberty, despite ample opportunity to do so, has not provided information to support further penalty violations. Addressing Liberty's claim that Con Edison's failure to "gas-in" the P riser created penalty liability, Staff argues, at 7, that gassing-in is not part of the integrity test mandated by the Ashburton Order.

Staff also addresses Liberty's claim, Liberty Memorandum of Law at pp. 31-32, that Con Edison violated Section 11.2 of its procedures because its Supervisor did not oversee the integrity tests. Staff argues, at 6 & n. 13, that Section 11.2 was not violated because it only applies to "buildings of public assembly" which, under 16 NYCRR §255.3, does not include apartment buildings.

Replying to Liberty's call for a full evidentiary hearing before the Commission, Staff notes that none of the plaintiffs in the civil litigation have called for such a hearing by the Commission. Staff then argues that, because the settlement amount exceeds the total amount of available penalties, no purpose would be served by holding such a hearing. Staff also asserts many of Liberty's alleged "underlying facts" are speculative, generalized comments not directed at the Gas Incident, or conclusions without support. Finally, Staff argues, at 8-9, that the remaining allegations of fact, even if true, would not support further violations or an increase in the total penalty amount.

Con Edison's Reply also argues a notice of impending negotiation was not required. Such notice must be given, Con Edison asserts, to parties having a right to participate in such negotiations, but Liberty had no such right because it only had limited intervenor status. Thus, Liberty had no right to notice of, or participation in, the settlement negotiations. Con Edison notes that the Secretary's April 1, 2001 letter-ruling granted Liberty only limited intervenor status, notwithstanding Liberty's request to "fully participate" so that it could "address the impropriety of any settlement...." Thus, Con Edison asserts, the Secretary denied Liberty full party status and limited the scope of Liberty's participation to receiving copies of documents and filings and providing comment. Con Edison states there is no

basis for Liberty's claim that plaintiffs and defendants in the pending personal injury litigation were entitled to notice of, and participation in, settlement of the Commission's case.

Con Edison contests Liberty's claims that the absence of civil penalties undermines the Commission's responsibility to oversee gas safety. The Company argues that changes in its procedures, and its associated training curriculum, have enhanced the safety of gas operations. It also asserts Liberty has conceded that, had the revisions been in place in July, 2008, the Gas Incident would not have occurred.³⁸

Con Edison notes that, unlike settlements, penalty actions entail litigation risks to the Commission as well as the Company, require considerable Commission resources, and provide no incremental benefits for gas ratepayers, since civil penalties could not be used to benefit gas ratepayers.³⁹

Con Edison next asserts the Commission should disregard the "factual allegations" in Liberty's Objection as untimely and beyond the scope of the statements authorized by the Secretary's May 20, 2011 "Notice Scheduling Comment Period." Con Edison asserts Liberty had ample opportunity, both in its response to the Commission's Order To Show Cause and in its Reply to Con Edison's response to the Commission's Order To Show Cause, to allege its version of the facts.

To the extent the Commission considers Liberty's factual allegations, Con Edison takes issue on several points. Con Edison's engineering analysis, in its April 29, 2011 response to Liberty's Memorandum of Law, showed, the Company claims, that the gas pressure at the Apartment 6P stove would have been sufficient to gas-in the riser and operate a stove burner even

³⁸ Con Edison Reply at 4 & n. 9 (citing Liberty Objection at 9).

³⁹ Con Edison Reply at 5 & n. 10.

with an open appliance valve in Apartment 2P.⁴⁰ Con Edison also asserts that, even if it had gassed-in Apartment 6P, that would not necessarily have led to discovery of an open valve in Apartment 2P. For example, the Company argues, if the valve in Apartment 2P were opened after Apartment 6P was gassed-in, the gassing-in of Apartment 6P would not have led to the discovery of an open valve. Con Edison asserts it was Liberty's responsibility to connect, gas-in, and re-light the stoves in apartments connected to the P riser. Had Liberty done so before leaving the building on July 25, 2008, Con Edison argues, the explosion would not have occurred. Con Edison further notes that, on the morning of July 25, 2008, Liberty had provided Con Edison with an affidavit falsely stating the flexible hose in Apartment 2P, between the stove and the gas line, had been replaced and that the P riser was "[r]eady for gas to be turned on...."⁴¹ That was untrue, but, if it had been true, gas would not have escaped through the open valve in Apartment 2P. Liberty, Con Edison asserts, should not have requested restoration of gas service to more risers than Liberty could make safe before leaving the building that Friday afternoon. Thus, Con Edison argues, Liberty could have, and should have, prevented this accident.

Next, Con Edison describes as nonsensical Liberty's claim that Con Edison's mechanic bled the P riser in Apartment 2P. Con Edison points to various sources that contradict Liberty's claim and asserts that Liberty misleadingly describes the contents of the Fire Marshall's memo book, and argues the Fire Marshall's records indicate Liberty, not Con Edison, performed the bleed of the P riser.⁴²

⁴⁰ Con Edison Reply at 6.

⁴¹ Con Edison Reply at 7.

⁴² Con Edison Reply at 9-10.

Finally, Con Edison rebuts Liberty's claim that Staff of the Gas Safety Section of the Office of Electric, Gas and Water improperly removed a conclusion from the initial draft of the Report to the effect that Con Edison's actions caused the explosion.⁴³ Con Edison asserts this is incorrect because the initial report never found Con Edison's actions caused the explosion, but only suggested that Con Edison's actions may have contributed to the root cause of the explosion.⁴⁴ Con Edison also argues that Staff properly revised its initial draft of the Report because the evidence did not support such a conclusion. Here Con Edison asserts the initial draft of the Report did not include any evidence, and contained no discussion, as to how Con Edison's alleged procedural violations may have contributed to the root cause of the explosions.⁴⁵

DISCUSSION

PSL §25(1) states that every public utility, and its agents and employees, "shall obey and comply with" the Public Service Law "and every order or regulation adopted under authority of" the Public Service Law. Maximum penalties are specified, depending on the offense. Under PSL §25(2), if a utility or its employees "knowingly fails or neglects to obey or comply with" a provision of the Public Service Law, or a Commission order, then a penalty of up to \$100,000 can be imposed for each offense. Under PSL §25(3), a higher penalty, of up to \$250,000 per violation, can be sought if the utility "knowingly fails or neglects to obey or comply with" a provision of the Public Service Law, or a Commission order or regulation adopted specifically for the protection of human safety. This higher

⁴³ Con Edison Reply at 10.

⁴⁴ Con Edison Reply at 9-10.

⁴⁵ Con Edison Reply at 10.

penalty, however, is available only "if it is determined by the commission that such safety violation caused or constituted a contributing factor in bringing about a death or personal injury...."

The Commission can recover such penalties by bringing an action in Supreme Court, and the Commission has the burden of proof. The Commission's authority to seek penalties is permissive, and wholly discretionary. Under PSL §26, "the commission may direct counsel" to bring a penalty action in Supreme Court (emphasis added). Finally, any penalties are forfeited to "the people of the state of New York," and cannot be used directly for the benefit of the ratepayers of the utility in question.⁴⁶

The Procedural Objections

This proceeding is an investigation, under PSL §§24 and 25, into whether the Commission should seek penalties in Supreme Court for violations of the Public Service Law, Commission regulations, and/or Commission regulations under the standards described above. Pursuant to our standard practice in such investigations of whether to bring a penalty action, Liberty's participation in this case was limited to commenting on documents, including the Agreement. We disagree with Liberty's assertions that Con Edison was required, under 16 NYCRR §3.9, to file a notice of impending negotiation with the Secretary, and to further provide actual notice to Liberty and all parties to the

⁴⁶ See PSL §25(2).

civil litigation to allow them to participate in negotiations. Section 3.9 was developed as a result of Commission experience with regulatory proceedings (i.e., rulemaking, adjudications and licenses), where the Commission makes final decisions with respect to regulatory actions and parties have legal rights to participate in a proceeding and show that a settlement is in the public interest.⁴⁷ The decision in this matter is not a final regulatory action where procedural rights to participate are recognized under the PSL or the State Administrative Procedure Law, so the Commission's settlement rules and guidelines do not apply.

Our standard practice in proceedings on whether to bring a penalty action is to limit participation by parties (other than the utility) to receiving and commenting on documents.⁴⁸ This practice follows the process in a court case, in which even if the Commission did choose to pursue a penalty action, intervenor participation would be limited. United States v. Hooker Chemical, 749 F.2d 968, 984-85 (2d Cir. 1984). Any Commission decision on whether to seek administrative penalties against Con Edison is a purely discretionary non-final decision within the Commission's prosecutorial function. PSL §26 ("the

⁴⁷ Cases 90-M-0225 and 92-M-0138, Procedures for Settlements and Stipulation Agreement, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines, Opinion No. 92-2 (issued March 24, 1992), pp. 3-4, 30.

⁴⁸ Case 10-G-0100, Investigation Whether a Penalty Should be Imposed on Consolidated Edison Company of New York, Inc. for the Death of a Queens Resident in the Natural Gas Explosion that Occurred on April 24, 2009 in Floral Park, New York, Letter-Ruling dated May 21, 2010. Case 04-E-0160, Investigation of The Death of a Manhattan Pedestrian and Whether Consolidated Edison Company of New York, Inc. Violated the Public Service Law, Order Denying Petition For Reconsideration (issued March 4, 2005).

commission may direct counsel to the commission to commence an action....")(emphasis added).

Further, Liberty was not a party in interest entitled to receive notice under 16 NYCRR §3.9, inasmuch as it was neither potentially subject to any administrative penalties nor are its legal rights affected. Therefore, it had no right or entitlement to actually participate in the settlement negotiations. This case was commenced solely to make preliminary findings envisioned by Public Service Law §25 before a separate, civil penalty action may be commenced.

Any Commission decision on whether to seek penalties in court against Con Edison is fundamentally different than a decision to adopt a Joint Proposal by and between the parties to a Commission rulemaking or adjudication. We are not deciding whether statutory standards for agency action under the Public Service Law or the State Administrative Procedure Act are met. Rather, the decision is whether causes of action can be stated for a violation of the Public Service Law. That decision will turn on whether the specific pleading requirements of PSL §25 for alleging a "knowing" violation of statute, order or regulation can be met. Here the Commission is making its own decisions about litigation risk and deciding whether to settle or bring an action in Supreme Court. PSL §25 creates no standard for decision on whether to bring a penalty action.

The only decision that will emerge from this case is whether the Commission will seek civil redress against Con Edison in a penalty action pursuant to PSL §25. That Commission decision to pursue an action in Supreme Court does not create any rights on Liberty's part. At most, a Commission decision not to seek penalties against Con Edison obliges Liberty to carry its own burdens in the civil litigation without a potential advantage, namely an administrative penalty finding it can use

against Con Edison. Liberty has no entitlement to, or right to insist upon, a Commission penalty action against Con Edison.

For all these reasons, we interpret our regulation under 16 NYCRR §3.9, as we have previously, as not applying to Show Cause proceedings like this one. Rather, Section 3.9 applies to rulemakings, adjudicatory and license proceedings. Therefore, we do not agree that the Agreement should be rejected because of a procedural defect.

Even though Liberty has no legal right to be heard in this case, it has been afforded an opportunity to be heard on the merits of the Agreement, and to be heard on whether the Commission should settle or prosecute this matter. Liberty has not made any showing that the notice it received, and the opportunities it has been given to comment in this proceeding, were less than adequate to allow it to fully present its views.

At bottom, Liberty complains that the Commission should enforce the Public Service Law more vigorously.⁴⁹ As discussed below, however, the Agreement fully vindicates our regulatory interests with respect to the Gas Incident as properly defined. Our decision not to commence a penalty action against Con Edison does not in any way "subvert the civil actions that are pending in the Queens County Supreme Court."⁵⁰ Liberty can maintain its claims against Con Edison in the civil negligence case without any Commission finding of a Con Edison contribution under PSL §25(3).

Liberty's Objections on the Merits

The burden of prosecuting a penalty action against Con Edison would be material. The case is complex, involving many parties, many witnesses, inconsistent and conflicting testimony,

⁴⁹ Objection, at pp. 9-10; Liberty Br., at pp. 35-38.

⁵⁰ Liberty Br., at 39.

and highly disputed issues of fact and law. This much is clear from Liberty's numerous filings, consisting of thousands of pages of deposition testimony and other records discovered to date in the civil actions. Those filings also demonstrate that Con Edison and Liberty have vigorously litigated the several consolidated civil lawsuits arising out of the Gas Incident. Those disputes have, indeed, spilled over into our consideration of whether to bring a penalty action. A Commission penalty action would likely also be vigorously litigated to the fullest extent allowed under law. We must carefully consider the benefits and burdens for ratepayers and must take into account the fact that litigating such a case would be complex, time consuming, and resource intensive.

The parties, particularly Liberty, have not identified any benefits that would warrant assuming the burdens of bringing a penalty action. With three exceptions which we find to be without merit as discussed below, Liberty has not identified any potential grounds, beyond those already identified in the Order to Show Cause, for seeking additional penalties in a Supreme Court penalty action against Con Edison. The regulatory liability under the Agreement equals or exceeds any penalties the Commission might obtain by fully prosecuting a penalty action. Therefore, the outcome under the Agreement meets or exceeds any fully litigated outcome. Given this, Liberty has not identified any legitimate basis for rejecting the Agreement.

The first exception is Liberty's claim that Con Edison violated the procedures because it "failed to perform any 'gas

outs' of the lines tested the date of the explosion...."⁵¹
According to Liberty's employee, had Con Edison tried to gas-out the stove in Apartment 6P the pilot light would not have lit, and, as a result, Con Edison would have discovered the open valve in Apartment 2P.⁵²

The Order To Show Cause did not identify Con Edison's failure to "gas-in" the risers as a basis for a penalty under PSL 25(2) or 25(3). Having reviewed the parties' submissions subsequent to the issuance of the Order To Show Cause, we now reaffirm our conclusion that Con Edison's failure to "gas-in" the risers does not give rise to an action for penalties against the utility in this particular case. This conclusion is based on our reading of our prior Ashburton Order, of Con Edison's procedures under G-11836-9 and our assessment of whether the statutory requirement for "safe and adequate" service would require a utility to perform the "gassing-in." Absent a Commission order specifically so requiring, we find no basis for seeking

⁵¹ Liberty Statement in Opposition, at p. 6 & ¶4. Although Liberty's filing refers to "gas outs," the correct term is the "gassing-in" a riser. "Gassing-in/purging is a process by which air is purged from the line by the introduction of natural gas. The gassing-in is routinely performed through an appliance i.e. lighting of a range top burner." April 2009 Report, at p. 5 & n. 8. Such "gassing-in" is done "[a]fter performing the integrity and continuity tests, [and after] gas [is] introduced into the line" April 2009 Report, at p. 5 & n. 8.

The April 2009 Report concluded that "Con Edison's procedure requires it to gas-in at least one appliance at the furthest point (from the meter) on the riser(s)." April 2009 Report, at p. 5. Similarly, the Order to Show Cause noted that the procedures required Con Edison to gas-in at least one appliance on each riser. See Order to Show Cause, at p. 5 (noting that, with respect to the B riser at least, "Con Edison did not gas in at least one appliance as required by procedure G-11836-9").

⁵² Liberty Statement in Opposition, at p. 6 & ¶5.

penalties, in light of the need to show a "knowing failure to neglect or comply" with the Ashburton Order or the statute.

In the Ashburton case, the Commission addressed the need to require a utility to test the integrity of interior piping before restoring gas service. The Commission was not addressing the safety risks of "gassing-in" interior piping, after integrity testing had been completed. Thus, we do not read the Ashburton Order as requiring Con Edison to "gas-in" appliances, especially given the statutory standard for a penalty action.

Con Edison's procedures themselves reflect this distinction between "integrity testing" and the "gassing-in" of tested and energized piping behind the meter. The procedures treat these functions as distinct. Compare G-11836-9, at §4.5 (indicating that the last step of the integrity test is the "bleeding" of the riser), and G-11836-9, at §4.6 (stating that, "[i]f the integrity test is acceptable[,]" the utility can then gas-in the piping).⁵³

Moreover, the record before us does not unequivocally support Liberty's claim that, if Con Edison had "gassed-in" the P riser, the open valve in Apartment 2P would have been discovered, and the explosion prevented. Instead, this appears to be a material issue of fact that may very well involve conflicting expert opinions. We have not attempted to decide whether Con Edison's apparent failure to follow the "gassing-in" procedure

⁵³ The mere fact that a procedure is set forth by the Company is not, by itself, enough to establish that it is required by the Commission. Con Edison's procedures may also be read as the Company's own view as to the appropriate standard of care. Non-compliance with a Company standard may nonetheless have bearing, in the civil litigation, on the question of whether Con Edison breached its duty, under tort law. That bearing, however, does not necessarily mean that the procedure in question is also a valid basis for penalties under the Public Service Law.

"caused or constituted a contributing factor in bringing about a death or personal injury" under PSL §25(3). There appears, however, to be an open question on whether we could support the necessary finding in any penalty action. Thus, based on this record, we do not accept Liberty's claim that Con Edison's failure to "gas-in" the risers necessarily provides a basis for penalties under the Public Service Law, Commission regulation, and/or prior Commission orders.

In prior filings in this case, but not in its Objection, Liberty argued that Con Edison violated Section 11.2 of its procedures which requires that, in "buildings of public assembly," a Con Edison Gas Field Supervisor be present during testing and turn-on of gas service. Con Edison's supervisor, Mr. Montalvo, was not present as required, Liberty asserts. Liberty argues the building at 147-25 Sanford Avenue should be deemed to be a "building of public assembly" because it has 90 apartment units, and because, had Mr. Montalvo been present, he would have found that Con Edison's mechanics did not "gas-in" the P riser as required. Liberty further asserts that interpreting "buildings of public assembly" to exclude the Sanford Avenue apartment building would be "inconsistent with the express requirements of the Ashburton Order that a Supervisor oversee the performance of the integrity test and turn on procedures in this case."⁵⁴

In response, Con Edison pointed out that apartment buildings, such as the building in this case, are expressly excluded from the regulatory definition of "building of public

⁵⁴ Liberty Br. at p. 32.

assembly.”⁵⁵ Con Edison also noted that, contrary to Liberty’s claim, the Ashburton Order does not, either expressly or otherwise, require that a Con Edison supervisor oversee a mechanic’s activities in restoring gas service inside a building. Id.

Based upon our reading of the regulation, and our Ashburton Order, we reject Liberty’s suggested interpretation of the phrase “buildings of public assembly” in Section 11.2 of the procedures. Liberty’s assertion that the apartment building at 147-25 Sanford Avenue is a “building of public assembly” is inconsistent with the regulation, which expressly excludes such residential apartment buildings. Additionally, Liberty’s claim about the requirements of the Ashburton Order is incorrect. Accordingly, we find no basis for seeking penalties against Con Edison for an alleged violation of Section 11.2 of the procedures.

Finally, we also see no basis for modifying the Agreement based on Liberty’s assertion that Con Edison personnel actually performed the “bleed” on the P riser and later disclaimed their involvement in the bleed subsequent to the explosion. Even if we assumed, contrary to Con Edison’s contention, that Con Edison performed the bleed on the P riser, this would not increase the computation of potential penalties in

⁵⁵ Response of Consolidated Edison Company of New York, Inc. to Memorandum of Law of Liberty Plumbing, Inc., at pp. 7-8 (April 29, 2011). The regulatory definition of “building of public assembly” is as follows: “any school, hospital, nursing home, institution licensed by New York State for the care of children, or any factory which normally employs 75 or more persons; or any other building with a nominal capacity of 75 or more persons to which the public is regularly admitted. Structures which are used solely as office buildings or residential apartments and normally have no other utilization in excess of the 75-person limit are excluded from this definition.” 16 NYCRR §255.3(a)(2).

the Order to Show Cause. The Order recited, among other things, that there were potential penalties of \$300,000 for failure to observe the bleeds of the last three risers, and a potential penalty of \$250,000 on the ground that the identified violations caused, or constituted a contributing factor in, the subsequent death and personal injury. The alleged recantation by Con Edison employees had the effect of creating liability for violation of a Commission order, as an admission that Con Edison failed to bleed three risers, a required part of integrity testing. Liberty's version of events would eliminate the \$300,000 penalty for failure to bleed the risers and potentially create a penalty liability of \$250,000 on the ground that the improper bleeding of the P riser caused or constituted a contributing factor in the death and injury. We decline to reopen the Agreement to consider the factual question Liberty raises, which does not materially affect the total potential penalty liability, and, therefore, does not materially affect our decision on whether to bring a penalty action. The questions Liberty raises may have implications for allocation of negligence liability between Con Edison and Liberty. However, the underlying question of which version of events is correct does not bear materially on our decision, and it should instead be pursued in the civil litigation.

Liberty also contends the Agreement will not adequately deter gas safety violations by Con Edison. Successful penalty actions deter safety violations by requiring utility shareholders to bear penalty costs, and depriving them of any tax deduction related to such penalties. The regulatory liability under the Agreement represents the full amount of penalties that might be available for the potential violations identified in the Order to Show Cause and captures the tax effect of the payment in lieu of potential penalties by grossing up the \$950,000 identified in the

Order to Show Cause to \$1.5 million. Thus, the Agreement has as much deterrent effect as a fully-litigated penalty action. If a penalty action were litigated, and all the factual issues in this matter were resolved in the Commission's favor, and the Court imposed the maximum penalties available under the Public Service Law, the amount paid by Con Edison shareholders would be no more than the regulatory liability the utility would incur under the Agreement. Liberty's argument to the contrary seems to overlook the statutory framework that limits the amount of penalties the Commission can seek. If Liberty believes the financial burden arising from the PSL is not a sufficient deterrent, it should address such concerns to the Legislature.

Given the limited purpose of this case, Liberty's objections relating to the Company's alleged wrongful conduct after July 25, 2008, are not controlling with respect to the acceptance of the Agreement as a basis for settling the penalty action. At most, they suggest we have valid grounds for exercising our enforcement powers to the fullest extent allowable under the law. In effect, however, this is what the Agreement achieves. It provides for a monetary payment by Con Edison's shareholders in an amount at least as great as what the Commission could possibly obtain if it successfully pursued all available penalties under the Public Service Law. Thus the Agreement fully achieves the discrete purposes of Section 25 of the Public Service Law.

This is not to say that we dismiss the concerns Liberty raised. Rather, we view them as largely outside the scope of this case. We do, however, clarify that we regard Clause II.3 of the Agreement pertaining to the relinquishment of penalty claims, as reaching only gas safety violations associated with the "Gas Incident," defined in the Agreement the explosion that occurred on July 25, 2008 at 147-25 Sanford Avenue, Queens. We do not

read the Agreement as limiting and we preserve our authority to bring any penalty action for violation(s) beyond gas safety violations, which was the focus of our investigation, (i.e., PSL §15, which prohibits, among other things, gifts to Department employees).⁵⁶ While Clause II 3 of the Agreement provides the Commission will not pursue a penalty action with regard to Con Edison actions "directly or indirectly related to the Gas Incident" we do not construe that as reaching conduct improperly affecting our Staff's investigation. We will require Con Edison to accept this reading of the Agreement as a condition of the approval of the Agreement.

The Commission orders:

1. The Agreement is approved and adopted, for the reasons set forth in the body of this order.
2. Consolidated Edison Company of New York is required to accept, within five days of issuance of this order, that Clause II. 3 of the Agreement reaches only gas safety violations associated with the Gas Incident and does not preclude us from pursuing any penalty action for violation(s) beyond gas safety violations such as Public Service Law §15.
3. This proceeding will be closed once the acceptance required in Clause 2 above is filed.

By the Commission,

JACLYN A. BRILLING
Secretary

⁵⁶ This clarification should not be read to imply that we have evidence of such violations.