

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

CASE 13-E-0030 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric Service.

CASE 13-G-0031 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Gas Service.

CASE 13-S-0032 - 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.

RULING ON DISCOVERY DISPUTE

(Issued May 16, 2013)

PAUL AGRESTA and JULIA SMEAD BIELAWSKI,  
Administrative Law Judges:

On April 29, 2013, the Utility Workers Union of America, Local 1-2, (Union) brought an unresolved discovery dispute to our attention regarding two information requests submitted to Consolidated Edison of New York, Inc. (Con Edison or Company). In those requests, the Union seeks internal reports, analyses, or related assessments that have been prepared by or for Con Edison concerning its performance in restoring service following Superstorm Sandy, and/or system readiness immediately prior to the storm and all documents provided to Con Edison's Board of Directors that concern or relate to the Company's performance in restoring service following Superstorm Sandy, including those that assess system readiness immediately prior to the storm. Con Edison objects to these inquires on the basis that its internal audits and investigations are protected from disclosure as a means of encouraging the efficacy and efficiency of internal, self-

critical analysis, and because it believes the requests to be irrelevant to the issues in these rate cases, overly broad and unduly burdensome.<sup>1</sup> The City of New York, US Power Generating and the Utility Intervention Unit submitted comments in support of disclosure.

On May 2, 2013, we issued a ruling establishing a schedule for briefing this issue and requiring Con Edison to provide an inventory of all documents in its possession encompassed by the Union's discovery requests, including a summary table describing the documents individually, and a summary notation for each individual document either stating the basis for its objection to disclosure or that the document will be disclosed. Thereafter, we considered a request by Con Edison that we modify our ruling to not require filing of the inventory due to Con Edison's concern that disclosure of the inventory would cause the Company to forfeit a material portion of the privilege the Company seeks to protect. The City of New York and the Union asked us to adhere to our original ruling. On May 7, 2013, we issued a ruling reaffirming our May 2, 2013 ruling.

---

<sup>1</sup> We understand the current dispute to be purely a discovery contest wherein Con Edison is asserting that it need not provide these documents to any party, notwithstanding Con Edison's citation of alleged precedents where documents were provided to Department of Public Service Staff (Staff) under a claim of confidentiality from public disclosure. Under our March 22, 2013 Ruling Establishing Revised Discovery Procedures and Adopting Protective Order (Protective Order), the Company may assert confidentiality of the information under the Freedom of Information Law (Public Officers Law, §§ 84 et seq.) as implemented by Part 6 of the Rules of the Public Service Commission (see 16 NYCRR §§6-1.4, et seq.) and parties would then be bound to treat the information in accordance with that Order. We do not perceive any such claim to be at issue here or resolved by this ruling.

On May 8, 2013, Con Edison submitted a brief in support of its objections to the discovery requests. On May 10, 2013, the Union and the City of New York submitted reply briefs.

Relevance

In challenging the relevance of the Union's request, Con Edison argues that there is no self-apparent nexus between Con Edison's internal assessments of Company preparation and response to a past storm, Superstorm Sandy, and the storm hardening capital projects and programs proposed by Con Edison in these rate cases. In its brief, Con Edison asserts:

The Company is unaware of any facts or circumstances that call into question the "readiness" of its system infrastructure immediately prior to Superstorm Sandy as raised by the Union request. Accordingly, the Company has made no staffing proposals to address a "readiness problem" that the Company has no reason to believe exists.

Con Edison emphasizes that Superstorm Sandy's damage to the Company's system and associated customer outages were the direct result of the impact of the worst storm and flooding experienced by the Company in its history. It explains that its rate filings do not request funding for incremental staffing to address issues of system readiness prior to Superstorm Sandy or to address a higher level of storm response and restoration associated with a future storm of the magnitude of Sandy because the issue of system readiness is readily distinguishable from issues relating to future planning criteria relating to flood levels and other indicia of major storms for which the Company should plan. According to Con Edison, to simply include Superstorm Sandy storm costs in the historic average for purposes of calculating a storm reserve amount for the Rate Year would be premature and may unreasonably burden current ratepayers with costs to address uncertain future events. However, Con Edison does anticipate that, during the course of

these proceedings, proposals will emerge that will guide the Company, Staff and parties to these proceeding in terms of the frequency, nature and intensity of future storms for which the Company should plan.

Con Edison further argues (a) that the rate filing purposefully does not detail how labor dollars will be spent as between Company employees and third party contractors so as to maintain the flexibility to use any combination of employees and/or contractors in managing the Company's workload as efficiently as is practicable; (b) each of the Company's incremental capital projects and programs, including the Company's proposed storm hardening measures, reflect an incremental labor component; (c) while certain factual information regarding Company staffing levels at the time of the storm may be relevant to assessing future staffing needs, the Union has not requested any specific data in this regard; (d) since the Company deploys its entire workforce, both union and management, along with additional resources to respond to a storm, there is no reasonable basis for assuming that internal staffing should be increased in order to better position the Company to respond to future major storms; (e) even assuming a greater frequency of future Sandy-like storms, that assumption does not dictate the need to increase, rather than re-assign and re-deploy, Company staff in order to properly prepare for such an event; (f) it is premature to make proposals to increase employee staffing pending the Company's assessment of how to better utilize its employees during a large restoration process and how to better supplement these internal resources; (g) on April 1, 2013, the Company filed with the Commission a number of updated plans that are forward-looking and reflect modifications to prior storm response and coast flood plans as a result of Sandy, in contrast to the backward-looking reports, analyses and

assessments sought by the Union; and (h) there is precedent to the effect that parties to rate cases should avoid raising issues not directly affecting rates, unless there is a specific reason to believe that exploration of the issue in a rate case will be more efficient than some other approach.

In response, the Union argues that the requested documents are directly relevant to matters at issue in these proceedings and, as such, fall well within any relevance standard applicable to discovery requests. According to the Union, having put "storm hardening" measures directly at issue, the Company should not be permitted to avoid producing documents that may be used to evaluate Con Edison's proposals.

In further response, the City of New York argues that the Commission's disclosure rules are very broad and the objector, not the party seeking the information, has the burden to prove its position. The City notes that one of the most significant issues in these rate cases is Con Edison's storm hardening plans and that reviewing the Company's lessons learned and assessments of its actions before, during and after Superstorm Sandy will provide useful information regarding the nature and scope of the actions it should take prospectively.

#### Discussion

In these proceedings, the Union wishes to pursue a theory that Con Edison has insufficient in-house personnel to respond adequately to storms and therefore future rates should reflect a requirement that Con Edison must provide for adequate in-house employment. We agree with the Union that this issue is relevant and material to these proceedings; indeed, we cannot conceive how such an issue could not be relevant and material. Storm response capability is a primary function of a utility company and of particular importance for a utility serving a

world-class metropolis like New York City that depends on electricity and other utility services as its life-blood.

Most of the arguments made by Con Edison address Con Edison's position on whether necessary functions must be performed by in-house personnel or may be adequately performed by outside contractors or other resources. Those arguments relate to the underlying merits of the issues and do not dissuade us that the issues are relevant. Con Edison's many arguments fail to convince us that the Union's discovery requests are not directly related to potential evidence of past adequacy or inadequacy that may well have an important bearing on resolving issues regarding the adequacy or inadequacy of staffing levels on a going-forward basis. Assessments of past adequacy are likely the best indicia of future adequacy. We find that there is a strong nexus between the discovery requests and the relevant and material issues properly raised by the Union. While the requests may seek a large volume of documents, we find the requests to be manageable and not unduly broad or vague. Accordingly, we deny Con Edison's objections as to relevance.

#### Privilege for Self-Critical Assessments

Con Edison argues that while protection from disclosure for self-critical assessments is not a legal privilege formally recognized by New York courts, the Commission and other regulatory bodies have recognized public policy interests surrounding the protection of such analyses because disclosing such reports will unavoidably have a chilling effect on a company's inclination to engage in future internal assessments and/or to produce an un-sanitized internal report of its findings. As evidence of its claim of a long-standing policy of the Commission in that regard, Con Edison cites a 1974 exchange of letters between then-Chairman of the Public Service

Commission, Alfred E. Kahn, and then-Chairman of Con Edison, Charles F. Luce, that resulted in DPS Staff gaining access to an internal audit report by Con Edison upon agreement to keeping the report confidential. Con Edison also cites a 1984 memorandum by Con Edison's then-Vice President and Controller Carl W. Greene wherein Mr. Greene observes that the then-Director of Utility Accounting and Finance of the Department of Public Service (DPS), Francis Herbert, agrees with Mr. Greene that certain utility audit reports must be kept confidential by DPS Staff. Thirdly, Con Edison cites a Commission opinion approving the terms of a settlement agreement that authorized a 1989 management self-assessment conducted by Niagara Mohawk Power Corporation to be kept confidential expressly to protect the self-assessment under a self-critical analysis privilege. Con Edison urges that these illustrations demonstrate the Commission's and Staff's acknowledgment of the public interest promoted by a policy of according confidential status to utility self-critical assessments. Con Edison also argues that this approach is comparable to that taken by the Nuclear Regulatory Commission to encourage self-assessment of nuclear safety objectives and discouraging the use of self-assessments to penalize utilities in rate proceedings. Con Edison urges that there is no current basis for changing these policies. Finally, Con Edison notes that it has relied on this practice for purposes of the self-assessments that the Company conducts and upon the assumption that any self-assessments will only be provided to Staff, when requested by Staff in the context of its audit powers under the Public Service Law.

In response, the Union acknowledges that there may be potential sensitivity concerns associated with at least some of the materials in question, therefore the Union does not object to them being produced pursuant to the Protective Order that is

already in place in this proceeding. The Union argues that producing the documents confidentially would adequately balance the Company's concerns with the interests of the Commission and parties to this proceeding in obtaining information needed to evaluate the justness and reasonableness of the requested rates.

The City of New York responds that the correspondence from Chairman Kahn was in his role as an officer of the Department of Public Service and does not indicate endorsement as a policy of the Commission; that it is limited to the specific instance discussed therein; and that it reflects a concern about keeping confidential the comments from individual employees. As to the memorandum from Mr. Greene, the City argues that the memorandum indicates that it was not distributed outside of Con Edison and there is no evidence that the DPS Staff agreed with the characterization of their comments or contents of the memorandum. As to the Niagara Mohawk instance, the City argues that the self-assessment was uniquely intended to further the goal of improving the utility's financial health, that the parties thereto were to be privy to the self-assessment, therefore the instance supports disclosure to the parties rather than Con Edison's objection.

#### Discussion

We find that former Public Service Commission Chairman Khan's letter of September 11, 1974 is not an expression of policy of the Commission. It expresses the former Chairman's personal concern that if individual employees know that their individual comments may become public, they might not feel as free to make them. We agree that is a valid concern that needs to be addressed in this context. Former Con Edison Chairman Luce's letter of September 17, 1974 raises an additional point of concern that is also valid. To assure wholehearted acceptance by the employees, internal audits need to be kept

highly confidential even within the Company.<sup>2</sup> We find former Con Edison Vice President and Controller Greene's memorandum of March 19, 1984 less useful. Mr. Greene's opinion was that if such reports were to be made available to the Public Service Commission, they would become "sanitized" first and as such would lose their impact; yet he agreed to make read-only copies available to the staff of the DPS "Auditing Department" for their use in conducting audit functions, but not rate cases. Neither the memorandum nor the claim that Mr. Herbert (formerly of DPS Staff) agreed with Mr. Greene's position provides any rationale for concluding that making read-only copies available to DPS audit staff for their use in conducting audit functions--including Staff audits to be reported to the Commission for its consideration and action--but not in rate cases, would not induce the Con Edison internal auditors to "sanitize" the reports, whereas making the reports directly available to the Commission would.

In short, we are not persuaded by the "sanitize" argument. The Commission requires utility companies to prepare and submit for Commission scrutiny public self-assessment reports of storm restoration activities after all major storm outage events. We would not wish to conclude, as Mr. Greene's memorandum suggests, that when Con Edison prepares such a report, its management first "sanitizes" it to the degree that the report loses its impact or efficacy.

Further, we do not read the cited Niagara Mohawk case as supportive of Con Edison's position that there is a Commission history of keeping self-assessments confidential. There, the parties executing the Agreement were to be provided

---

<sup>2</sup> Chairman Luce also points out that, although useful, criticism made by internal auditors not intimately familiar with the practicalities of the operation being audited can be "quite wide of the mark" and cannot be accepted "as gospel."

with all the self-assessment documents for their use in participating in the self-assessment, negotiations contemplated by the Agreement, reviewing whether milestones were met or incentives were earned by the Company, and "supporting proposed adjustments to the Company's rates for the period following the end of the implementation period, [provided] that any such proposed adjustment [was not] based on any acts or omissions of the Company related to or discovered as a result of the self-assessment or implementation process."<sup>3</sup> The parties to the Agreement were defined as the Company (Niagara Mohawk Power Corporation), Staff of the Department of Public Service, the Attorney General, the Consumer Protection Board, and Multiple Intervenors. While it could be argued that many of those parties are similar in function to DPS Staff, Multiple Intervenors, a coalition of large, privately-owned industrial users of electricity, is clearly not a governmental party. We do not see how Multiple Intervenors' access to a utility company self-assessment subject to confidentiality rules would be any different than giving the Union, a similarly non-public entity, access to a Con Edison self-assessment subject to confidentiality rules. We note also that the Union has offered that if granted access to the documents, it intends to treat them as confidential.

Most of the documents described above do not directly address the discovery rights of third parties. We also note that none of the documents referenced address the reverse possibility that some employees might find it empowering and may be more freely expressive knowing that their comments to the internal auditor might be released outside the Company in a manner that is not sanitized by a direct supervisor or manager.

---

<sup>3</sup> Cases 29327, et al., Niagara Mohawk Power Corporation - Rates and Other Matters, Opinion No. 89-37 (issued October 20, 1989), mimeo Attachment 2, pp. 2-5.

Employee empowerment is one of the functions of having the audit done by an auditor that is independent of the unit being audited, and of keeping the details of the reports highly confidential within the organization from the reporting employee's supervisor or manager from which the employee may fear repercussions. Maximum empowerment and free expression, and therefore usefulness of the information provided, would seemingly occur where the employee's criticisms and improvement ideas are guaranteed to be released outside the Company without revealing the identity of the employee making the suggestions.

All sides appear to agree that Con Edison is not entitled to assert the proposed privilege as a matter of law. Con Edison requests that it be applied as a matter of policy. After careful consideration of these issues, we see a reason to distinguish between individual employee utterances and Company-produced audits, reports and self-assessments that may or may not contain such utterances. Former Chairman Khan's concern that led to the pragmatic practice of DPS Staff agreeing to withhold utility audits from the public so long as DPS Staff could have them for its own use was that individual employees would not be forthcoming with their ideas, suggestions and criticisms without an assurance of confidentiality. We are not persuaded that the way to address that concern in a rate case is to bar parties other than DPS Staff from access to the entirety of all Company-produced audits, reports and self-assessments. The general right to discovery is very broad and any limitation on that right should be narrowly construed.

We conclude that the proper resolution of this discovery dispute is to require Con Edison to produce the documents that have been requested by the Union, to the Union and any other party desiring a copy that commits to keeping the documents confidential in the manner provided in our Protective

Order, but that the documents produced shall be redacted to omit the minimum information necessary to protect the identity of individual Con Edison employees that may have contributed specific ideas, suggestions and criticisms to the self-assessments. The specific ideas, suggestions and criticisms should be revealed to the maximum extent possible consistent with the notion that the identity of the contributing individuals is not to be revealed. Redacted and un-redacted versions shall be submitted solely to the Administrative Law Judges primarily so that we can police the redaction process. The other arguments advanced by the parties were considered and not found to be dispositive.

CONCLUSION

For the foregoing reasons, Con Edison's objections to the discovery requests are denied. Con Edison is directed to make any redactions in the manner described in the body of the ruling and within three business days of the date of issuance of this ruling to serve the redacted copies on the parties that agree to keep them confidential subject to and in the manner provided in the Protective Order. Un-redacted and redacted copies shall be served on the Administrative law Judges at the same time.

(SIGNED)

PAUL AGRESTA

(SIGNED)

JULIA SMEAD BIELAWSKI