

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 ESTABLISHING REVISED DISCOVERY
PROCEDURES AND ADOPTING PROTECTIVE ORDER

(Issued March 22, 2013)

PAUL AGRESTA and JULIA S. BIELAWSKI,
Administrative Law Judges:

This ruling addresses procedures for handling information that may be entitled to protection from public disclosure. It supersedes a previous ruling adopted in these cases on an interim basis.¹ At the pre-hearing conference held on March 11, 2013 in these cases, the parties were heard on whether amendments to the Interim Ruling were necessary or desirable. As a result of that process, some changes from the Interim Ruling are reflected herein. The purpose of this ruling is to expedite the discovery process by allowing most materials to be shared with interested parties without having to wait for a decision whether the items are protected from disclosure.

¹ Case 13-E-0030, et al., Consolidated Edison Company of New York, Inc. - Electric, Gas and Steam Rates, Interim Ruling Establishing Discovery Procedures and Adopting Protective Order (issued February 11, 2013)(Interim Ruling).

Given the extent and complexity of these proceedings being heard on a common record, the amount of discovery likely to be performed, and timing concerns given the limits of the suspension periods, establishment of these procedures and issuance of a Protective Order is reasonable. The Protective Order is not, however, a substitute for the individual review of potentially-protected material required by law. Any materials provided as Protected Information must be submitted to the assigned Administrative Law Judges along with a detailed explanation in all instances of why the material qualifies for an exemption from disclosure. These procedures and the Protective Order governed by this ruling shall remain effective until the ruling is amended, any appeals on this ruling are decided finally, or the applicability of this ruling is otherwise terminated.

Now, therefore, the following Protective Order is ordered and entered in these proceedings:

PROTECTIVE ORDER

Protected Information

1. "Protected Information" is information that is required to be protected from public disclosure 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 in (16 NYCRR §6-1.1 et seq.). Under those Rules, information becomes Protected Information when it is submitted by a party (Providing Party) together with a claim of protected status that is supported by a comprehensive brief as required by 16 NYCRR §6-1.4(a)(2). The submitted information retains its protected status until, at a minimum, 15 days after the Providing Party's claim has been finally denied (16 NYCRR §6-1.4(a)(3)). The purpose of this Protective Order is to make

Protected Information available to the parties promptly, in order to facilitate their participation in and the expeditious conduct of these proceedings, without adversely affecting any legitimate interest of either a Providing Party in maintaining its confidentiality or any other party in challenging its confidentiality. A Providing Party designating information as Protected Information under this Protective Order shall comply with the labeling requirements of paragraph 11 of this Protective Order and shall provide each party receiving such information (Receiving Party) with a statement identifying which of the following categories warranting confidential treatment is claimed to apply:

- (a) Critical energy infrastructure information (CEII);
- (b) Personal information that raises privacy issues;
- (c) Individual customer information (e.g., billing or usage data);
- (d) Proprietary intellectual property;
- (e) Forward-looking financial information or market sensitive information; or
- (f) Information that would impair the imminent award of contracts.

Access to Protected Information

2. Protected Information is subject to the terms of 16 NYCRR. § 6-1.4 and this Protective Order and must be treated in accordance with the terms of this Protective Order by all persons who are given access to such information unless and until the Providing Party's claims of protected status are rejected by an administratively final order or withdrawn by the Providing Party.

3. The following parties are entitled to access to Protected Information: any party that (a) has requested the

information or would normally be entitled to be served with it under the Commission's Rules of Procedure; and (b) has agreed in writing to comply with and be bound by the terms of this Protective Order by executing a copy of the Protection Agreement set forth in the Appendix. When a party executes the Protection Agreement, it agrees for itself and its officers, principals, employees, and agents to be bound by this Protective Order with respect to Protected Information submitted by any Providing Party at any time during this proceeding. Copies of each signed Protection Agreement must be provided to all active parties and to the Administrative Law Judges assigned to these proceedings. Employees of the New York State Department of Public Service (DPS Staff), the Utility Intervention Unit, Division of Consumer Protection, New York State Department of State (UIU), the Office of the Attorney General (AG), and the New York State Office of General Services (OGS) are subject to the provisions of §15 of the Public Service Law, §74 of the Public Officers Law, or both, which provide for disciplinary action, fine, or prosecution for the disclosure of confidential information. Therefore, employees of the DPS Staff, UIU, AG and OGS are not required to execute the Protection Agreement in this Protective Order to have access to Protected Information.

4. Any response to an information request that requires the production of Protected Information will be supplied only to DPS Staff, UIU, AG, OGS and other parties that have executed the Protection Agreement. In lieu of the Protected Information itself, a Providing Party must send other parties a redacted version of the response. A party may request all or some of the redacted information at any time during this proceeding, subject to the terms of this Protective Order. A Providing Party may opt to not supply Protected Information to certain parties that have executed the Protection Agreement if

the Providing Party believes such certain parties to be among the persons for whom exceptions to disclosure of the particular Protected Information are or should be established. In exercising such an option, the Providing Party shall as part of the information to be provided as described in paragraph 7 below, provide a written statement of justification for its belief that such certain parties are among the persons for whom exceptions to disclosure of the particular Protected Information are or should be established. If such certain parties have objections to the withholding of the Protected Information, and the Providing Party and such certain parties have attempted to resolve the objections on an informal basis but cannot reach agreement, the matter may be brought to the Administrative Law Judges for resolution in accordance with the procedures set forth in paragraph 13 below. In addition, if there is a condition placed upon the disclosure of responsive information produced by an outside consultant in order to protect the confidentiality of the consultant's proprietary model, or for some other similar reason necessary to protect the consultant's legitimate commercial interests, the Providing Party may condition the release of the information to the other parties except DPS Staff, UIU, AG, OGS upon their agreement to sign a separate confidentiality agreement designed to protect the consultant's legitimate commercial interests. Any such agreement shall not impose unreasonable restrictions on the ability of the parties to use such information in these proceedings. If any parties have objections to any such agreement, and the Providing Party and such objecting parties have attempted to resolve the objections on an informal basis but cannot reach agreement, the matter may be brought to the Administrative Law Judges for resolution in accordance with the procedures set forth in paragraph 13 below.

5. Except as otherwise provided in this Protective Order, any Protected Information supplied to a Receiving Party pursuant to paragraph 3 above must be provided in the first instance: (a) to counsel for the Receiving Party, or the Receiving Party's authorized representative in lieu of counsel, who executed the Protection Agreement for that party; or (b) to another person specifically designated by the Receiving Party's counsel or authorized representative, provided that such individual is not denied access as an Excluded Employee, as defined in this paragraph. Counsel of record or authorized representative of a Receiving Party may, on a need-to-know basis and solely for the purposes of this proceeding, provide access to such materials to the following persons, subject to the conditions set forth in this Protective Order: (a) persons not employed by the Receiving Party or its affiliates but who are identified by that party as Outside Experts participating in this proceeding on behalf of that party, provided that each such person has executed the Protection Agreement and a copy of that agreement has been provided to all parties and the Administrative Law Judges; and (b) employees of the Receiving Party or its affiliates other than Excluded Employees. An "Excluded Employee" is any employee with responsibilities for any of the following activities on behalf of the Receiving Party: (i) developing, planning, marketing, or selling retail services or other retail offerings; (ii) strategic or business planning; or (iii) competitive assessment.

6. Counsel or other authorized representative that has signed the Protection Agreement on behalf of the Receiving Party is responsible for ensuring compliance of that party, including its officers, principals, employees, agents, and consultants, with the terms of this Protective Order.

Determination of Protected Status

7. Each item provided to parties under this Protective Order will be provided to the Administrative Law Judges with a detailed description of how the information meets the criteria for exemption from public disclosure under the Commission's rules and the State Freedom of Information Law. The Administrative Law Judges intend to interpret such exemptions in a narrow fashion, as required by law. If a party intends to include protected information in briefs, motions, testimony, exhibits, or other materials filed in this proceeding (collectively, Pleadings), and a specific ruling from the Administrative Law Judges has not been issued with regard to that information, the party will notify the Administrative Law Judges on a confidential basis at least seven days prior to including the information in Pleadings; or, if seven days' notice is not feasible, the party will make a good faith effort to provide as much notice as is practical.

Safeguarding Protected Information

8. No duplication or reproduction of the Protected Information may be made beyond that which is necessary to give access to the persons authorized by the provisions of this Protective Order. Persons who are provided with access to Protected Information pursuant to this Protective Order may take limited notes regarding such information to the extent necessary in connection with this proceeding. The protections afforded to Protected Information apply not only to the originally provided document or file in which it was contained, but also to any subsequent documents, notes, recordings, electronic files, or other media in which it may be recorded, including copies generated by automated back-up systems for computer workstation and network data storage devices.

9. No person entitled to receive or afforded access to any Protected Information by reason of this Protective Order may either use or disclose the Protected Information for any purpose other than preparation for and conduct of this proceeding and then solely as contemplated in this Protective Order. Each such person must use her or his best efforts to keep the Protected Information secure in accordance with the terms, purposes, and intent of this Protective Order. To this end, persons having custody of any Protected Information must keep all copies and notes of Protected Information segregated physically under lock, electronically under password protection or encryption, and otherwise properly secured when they are not being reviewed and must not disclose Protected Information except as permitted by the provisions of this Protective Order, unless and until such Protected Information is released from the restrictions of this Protective Order, either through agreement of the parties or pursuant to a ruling of the Administrative Law Judges. If requested by the Providing Party, the Receiving Party shall provide to the Providing Party a written description of the methods that will be used to safeguard the Protected Information by each individual receiving the Protected Information.

10. As an alternative to the safeguarding terms of sentence three of paragraph 9 of this Protective Order, the Receiving Party may propose to the Providing Party an alternative set of measures intended to secure Protected Information from disclosure to, or review by, any unauthorized party. The Providing Party will not unreasonably withhold its acceptance of an alternative proposed by the Receiving Party provided that the level of protection provided by the proposal is at least as great as the protections found in paragraph 9. The methods established in any agreement that is reached between

the Providing Party and the Receiving Party under this paragraph shall establish the means of securing Protected Information that the Receiving Party must satisfy.

Handling and Treatment of
Protected Material in These Proceedings

11. Whenever documents or other materials containing Protected Information are to be provided to a Receiving Party, the Providing Party must designate such documents as containing Protected Information by placing the following designation on the cover page of any document or report covered by this Protective Order and on each page containing Protected Information: "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER IN NY PSC CASES 13-E-0030, 13-G-0031 AND/OR 13-S-0032." Any document produced with such notation will be deemed to be subject to the terms of this Protective Order. Where it would be unreasonably difficult to place this notation on each page of the document on which Protected Information appears, because it is voluminous or for other good cause shown, the notation may be placed only on the first page of that document.

12. A Receiving Party may object to the designation of particular documents or other materials as Protected Information, in accordance with the procedure described in paragraph 13 below.

13. A Receiving Party objecting to the designation of documents or materials as Protected Information must notify the Providing Party, other parties to this proceeding entitled to access to the information in question, and the Administrative Law Judges of its objection. Upon such an objection, within seven days the Providing Party must submit the documents or materials in question, with its comprehensive brief justifying the claim for confidential treatment, to the Administrative Law Judges in conformance with the provisions of 16 NYCRR §6-1.4(a)(1) and (a)(2).

14. To facilitate the review and inspection of Protected Information produced pursuant to this Protective Order, the Receiving Party will be provided with that Protected Information promptly by electronic means. If it is impractical to provide that Protected Information by electronic means it must be provided by overnight mail. The provisions of this paragraph do not limit or change in any way the provisions of the Commission's rules relating to the time within which interrogatories or other discovery requests must be answered.

15. Subject to any special protection granted, parties may refer to Protected Information in briefs, motions, testimony, exhibits, or other materials filed in this proceeding (collectively, Pleadings), provided that separate versions of such Pleadings are prepared that include and omit the Protected Information (the Unredacted Version and the Redacted Version, respectively), and that the Unredacted Version of any Pleadings be provided solely to the Administrative Law Judge, DPS Staff, and parties that are entitled to have access to Protected Information pursuant to the terms of this Protective Order. Under no circumstances should Protected Information be included in copies of Pleadings that are lodged with the Secretary's Office for inclusion in the Commission's public files. The Unredacted Version of a Pleading must bear a conspicuous notation on the cover page and on each page bearing Protected Information, as set forth in paragraph 10 of this Protective Order. The Unredacted Version of any Pleading will be treated as Protected Information pursuant to this Protective Order.

16. At any hearing or conference in these proceedings, no witness, other than an employee or representative of the Providing Party, may be questioned with respect to any Protected Information unless that person would be entitled to access to Protected Information pursuant to the

terms of this Protective Order. If Protected Information is included in Pleadings that have been pre-filed and are subject to cross-examination, the Administrative Law Judges intend to convene a pre-hearing conference to consider the extent to which such information must be protected in the context of public hearings, and to consider methods for providing such protection if needed. The Administrative Law Judges will be inclined to minimize, to the extent possible, the need for a redacted record.

17. No person other than those who would be entitled to access to Protected Information pursuant to the terms of this Protective Order may be permitted to hear or review testimony given or discussion held with respect to Protected Information.

Unauthorized Release of Protected Information

18. If a party believes that it may have disclosed Protected Information to a person not entitled to receive it under the terms of this Protective Order, it will notify the Providing Party immediately and will give detailed information concerning all steps taken or being taken to reverse or minimize the impacts of the improper release. If the Providing Party agrees to share its Protected Information with persons not previously entitled to receive it, it will inform the Administrative Law Judges promptly.

19. Persons who use or disclose Protected Information contrary to the terms of this Protective Order will be subject to such sanctions as may be imposed by the Administrative Law Judges or the Commission, which may include limitation or termination of the responsible party's participation in this proceeding. Such persons and the parties they represent may also be liable criminally or civilly under relevant federal and State statutes and regulations.

Rights Not Waived by Acceptance of this Protective Order

20. Nothing in this Protective Order limits in any way the right of any party to question, challenge, or object to the admissibility of any or all Protected Information furnished under the terms of this Protective Order on any grounds available by law, including relevancy and materiality.

21. Nothing in this Protective Order limits or expands in any way the applicable law concerning the permissible scope of discovery.

22. This Protective Order shall in no way constitute any waiver of the rights of any party in this proceeding to contest any assertion, or to appeal any finding, that specific information is or is not Protected Information or that such information should or should not be subject to the protective requirements of this Protective Order. This Protective Order in no way constitutes any waiver of the rights of a party to appeal, in accordance with 16 NYCRR. § 6-1.4 or Freedom of Information Law § 87, a ruling of the Administrative Law Judges or to appeal a final order of the Commission as to the status as Protected Information of any information sought in connection with this proceeding.

Return or Destruction of Protected Information

23. Within one year following completion of this proceeding, including the periods for administrative or judicial review thereof, a person in possession of Protected Information will return it to the Providing Party or certify to the Providing Party that it has been destroyed. The certification will describe how the Protected Information was destroyed and address the destruction of any subsequent documents, notes, recordings, electronic files, or other media in which it may be recorded, including copies generated by automated back-up systems for computer workstations and network data storage

devices. DPS Staff, UIU, AG or OGS may notify the Providing Party that it will retain specific Protected Information for a specified longer period of time provided that confidentiality is maintained consistent with the terms and conditions of the Protective Order. Other parties may retain Protected Information beyond the one-year period only if given express permission to do so by the Providing Party.

24. Nothing in this Protective Order imposes any obligations upon a Providing Party with respect to the handling of its own Protected Information.

(SIGNED)

PAUL AGRESTA

(SIGNED)

JULIA S. BIELAWSKI

PROTECTION AGREEMENT

I acknowledge that I have received and read a copy of the Protective Order issued on _____, 2013, entered by ruling of the presiding officers in Cases 13-E-0030, 13-G-0031 and 13-S-0032 before the Public Service Commission of the State of New York. The terms and conditions of the Protective Order are incorporated by reference in this Protection Agreement as if fully set forth herein.

I understand that certain information I will receive is claimed by the Providing Party to be Protected Information as defined in the Protective Order. I also understand that the use or disclosure of Protected Information, other than as set forth in the Protective Order, may cause substantial harm to the Providing Party or others. I further understand that any violation of this Protective Order may subject the Receiving Party to civil liability.

I agree to comply with and be bound by the terms and conditions of the Protective Order and, except as specifically provided therein, agree that I will not disclose Protected Information to any person, firm, or corporation, copy or otherwise reproduce Protected Information, or use Protected Information for my benefit or the benefit of any other person, firm, or corporation.

I hereby certify that I am not an officer, director, employee or agent for any entity other than the entity listed below.

SIGNATURE:

ADDRESS:

TITLE:

JOB RESPONSIBILITY:

PARTY RESPONSIBILITY:

EMPLOYER:

DATE: