

State of New York
Public Service Commission

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 Nos. 16-E-0060

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 Nos. 16-G-0061

TESTIMONY IN OPPOSITION OF THE JOINT PROPOSAL

JAMES KILKENNY

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1 **I. STATEMENT OF QUALIFICATIONS**

2 **Q. PLEASE STATE YOUR NAME, ORGANIZATION AFFILIATION AND**
3 **BUSINESS ADDRESS.**

4 A. My name is James Kilkenny. I am a director of the board and Secretary/Treasurer for the
5 New York Independent Contractors Alliance (“NYICA”), an organization of small
6 construction business owners in New York State, some of whom have been performing
7 construction work for Consolidated Edison for 30 years.

8 My business address is 1902 Whitestone Expy Suite 303A, Whitestone, NY 11357-3099

9 **Q. FOR WHOM DO YOU WORK?**

10 A. I am retired.

11 **Q. WHAT TYPE OF WORK DID YOU PERFORM BEFORE RETIREMENT?**

12 I served as Borough Commissioner of Bronx County for the NEW YORK CITY
13 DEPARTMENT OF TRANSPORTATION for 9 years in which capacity I oversaw
14 all aspects of roadway repair and improvements which included pothole repair, street
15 milling, street paving, and installation of speed humps, directional signs and street
16 signals. I was also responsible for the highway repair unit. I was also involved in bid
17 openings for outside contractors who bid on NYC DOT work.

18 **Q. BY WHOM WERE YOU EMPLOYED PRIOR TO BECOMING BOROUGH**
19 **COMMISSIONER FOR NEW YORK CITY DEPARTMENT OF**
20 **TRANSPORTATION?**

21 A. Prior to my work for New York City Department of Transportation, I was employed by
22 Bettigole Consulting, P.C. which was contracted by New York State Department of
23 Transportation to oversee construction on state roadways within the five boroughs. My
24 position as office engineer was to reconcile payments between contractors and the state to
25 ensure that the job was done properly. Prior to becoming office engineer I acted as an
26 inspector in the field.

27 **Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?**

1 A. I have a Bachelor of Science in Business Administration and Marketing from
2 Manhattan College and a Bachelor of Theology from Saint Paul's University.

3 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE NEW YORK STATE**
4 **PUBLIC SERVICE COMMISSION?**

5 A. No.

6 **II. SCOPE AND PURPOSE OF THIS TESTIMONY**

7 **Q. DO YOU WISH TO SPONSOR ANY EXHIBITS?**

8 A. Yes. I am submitting Exhibit 1: Consolidated Edison's Standard Terms and Agreement
9 prior to 2014; Exhibit 2: Consolidated Edison's Standard Terms and Agreement to date;
10 Exhibit 3: a copy of an email from Consolidated Edison's Contract Manager Steven
11 Sebastopolis to John Denagall, owner of Nico requiring Mr. Denagall to sign a labor
12 agreement with a Building Construction Trades Council member union by November
13 2015 to comply with Standard Terms and Agreements and Exhibit 4: Public Service
14 Commission's Press Release dated April 2016 - PSC Announces \$171 Million Settlement
15 to Benefit Con Edison Customers— Utility Investigated by Commission After
16 Employees Accepted Bribes and Kickbacks.

17 **Q. WHAT ASPECT OF THE JOINT PROPOSAL WILL YOUR TESTIMONY**
18 **ADDRESS?**

19 A. NYICA wishes to address Section E-2 of the Joint Proposal as it relates to the ratepayer
20 reimbursing Consolidated Edison ("Con Ed" or the "Company") for Municipal
21 Infrastructure Support expenses ("Interference Costs").

22 At present, the Company does not pass its Interference Costs along to the ratepayers, and
23 thus has a significant incentive to monitor and control costs. We understand that the
24 Company now asks the PSC to permit the Company to recover some of its future
25 Interference Costs from the ratepayers if it spends above the target numbers as set forth in
26 Appendices 8&9.

27 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

1 A. NYICA submits that before the PSC can consider allowing the ratepayer to reimburse
2 the Company for Interference Costs, the PSC must be certain of two facts:

3 1) That the PSC has been fully, accurately and reliably informed by Con Ed as to its
4 estimated future Interference Costs, so that the PSC can make an informed decision on
5 the implications of passing these costs along to ratepayers.

6 2) That if the PSC eliminates some or most of Con Ed's financial incentive to control and
7 minimize its Interference Costs by transferring some or most of these expenses to the
8 ratepayer, Con Ed will nonetheless seek to minimize its future Interference Costs, such
9 that the PSC will not find itself having inadvertently approved a rate increase that is
10 significantly higher than originally expected.

11 As currently drafted, NYICA opposes PSC approval of the Company's request because:

12 1) The Company has not presented an accurate and complete budget forecast for
13 Interference Costs, and

14 2) The Company has a demonstrated track record of making decisions that increase its
15 construction costs for non-business purposes, which presents a risk of future uncontrolled
16 and unwarranted costs to the ratepayer.

17 **Q. HOW MUCH MONEY IS AT STAKE CONCERNING THIS ISSUE?**

18 A. Con Ed is asking the PSC to pass along approximately 80 percent of Interference Costs
19 over and above the budget forecast, up to approximately \$22.8 million. Specifically, the
20 ratepayer is therefore at risk to pay for an approximate additional \$22.8 million in
21 expenses.

22 **Q. FOR THE PSC'S CONVENIENCE, CAN YOU BRIEFLY IDENTIFY THE**
23 **EXACT SECTIONS OF THE JOINT PROPOSAL AND MR. BOYLE'S**
24 **TESTIMONY TO WHICH YOU ARE REFERRING?**

25 A. Yes. Section E-2 of the Joint Proposal reads, "*If actual non-Company labor Municipal*
26 *Infrastructure Support expenses (e.g., contractors costs) vary from the level provided in*
27 *electric and/or gas rates for any Rate Year, which levels are set forth in Appendices 8*
28 *and 9, one hundred (100) percent of the variation below the target will be deferred on the*

1 *Company's books of account and credited to customers, and eighty (80) percent of the*
2 *variation above the target within a band of thirty (30) percent (e.g., for electric a*
3 *maximum deferral of \$22.8 million for RY1) will be deferred on the Company's books of*
4 *account and recovered from customers. Expenditures above the target plus thirty (30)*
5 *percent are not recoverable from customers except as follows: if actual electric and/or*
6 *gas non-Company labor Municipal Infrastructure Support expenses (e.g., contractors*
7 *costs) vary from the respective level provided in rates above the target plus thirty (30)*
8 *percent, and such increased expenses are due to (a) projects of the City of New York or*
9 *any other governmental entity or entities for the purposes of increasing the resiliency to*
10 *storms of any form of public facility, machinery, equipment, structure, infrastructure,*
11 *highway, road, street, or grounds, (b) the New York City DEP Combined Sewer Overflow*
12 *projects,⁴⁵ and/or (c) all other public works or municipal infrastructure projects with a*
13 *projected total cost in excess of \$100 million, eighty (80) percent of the variation above*
14 *the target plus thirty (30) percent that is attributable to the above-described projects will*
15 *be deferred on the Company's books of account for future recovery from electric and/or*
16 *gas customers as applicable.*

17 *In addition, if there is a change in law, rules or customary practice relating to*
18 *interference (e.g., responsibility for costs associated with New York City transit projects),*
19 *the Company will have the right to defer such incremental costs pursuant to section P.2."*

20 As part of the process for establishing a target number for MIS, which is memorialized in
21 the Joint Proposal in Appendices 8 & 9, Mr. Robert Boyle, Vice President for
22 Construction for Consolidated Edison offered direct testimony and rebuttal testimony to
23 the Municipal Infrastructure Support Panel.

24 In the document titled, "MUNICIPAL INFRASTRUCTURE SUPPORT PANEL
25 ELECTRIC & GAS, in the section, FORECASTING METHODOLOGY, on pages 26/27
26 Mr. Boyle is asked, "Why did you use a three-year average for annual programs rather
27 than a five-year average?"

28 Mr. Boyle replies, "The three year average is the traditional approach for recurring work
29 of the same or similar nature, which has long been accepted in Con Edison rate filings for

1 developing forecasts for various types of costs where there is no additional information
2 that warrants the use of a different historical period."

3 In additional testimony from the document titled, "MUNICIPAL INFRASTRUCTURE
4 SUPPORT PANEL UPDATE/REBUTTAL TESTIMONY", on pages 10/11, Mr. Boyle
5 is asked, "Should there be a concern that the Company will not seek to minimize its
6 interference costs if there is full reconciliation of these expenses?"

7 Mr. Boyle responded, "There should be no concern. The Company has demonstrated a
8 long-standing and consistent approach to mitigating these costs, to the extent practicable,
9 utilizing multiple controls both internal and external of the Company, and continued
10 coordination between the City and the Company during the design phase, which is a
11 critical component of the continued success in controlling rising costs. This approach has
12 also been evident during periods when a bilateral reconciliation mechanism for
13 interference expenses was in place. Moreover, these cost mitigation efforts are also now
14 engrained in the Company's efforts to implement the cost management cultural
15 imperative resulting from the Management Audit."

16 **Q. TO ADDRESS YOUR FIRST POINT, IS THE THREE-YEAR HISTORY OF**
17 **INTERFERENCE COSTS PRESENTED BY CON ED TO THE PSC A**
18 **RELIABLE ESTIMATE OF CON ED'S FUTURE INTERFERENCE COSTS?**

19 A. No.

20 **Q. WHY NOT?**

21 A. The three-year-history is based on the years 2013 through 2015. Due to a recent change
22 in Con Ed's Standard Terms and Conditions, the companies who have consistently and
23 repeatedly bid on and been awarded contracts for Con Ed construction work during those
24 years, will in future be barred from being awarded the work unless they sign an additional
25 labor agreement with a member union of the Building Construction Trades Council
26 (BCTC) of Greater New York. As a result, the favorable cost of contracts that existed
27 during the three sample years will no longer exist in future years. The PSC therefore
28 cannot rely on the accuracy of any future Con Ed forecast that is based solely on
29 historical costs.

1 **Q. YOU SAY THAT CON ED'S ESTIMATE OF FUTURE CONSTRUCTION**
2 **COSTS IS NOT RELIABLE. WILL USING ONLY CONTRACTORS WHO**
3 **HAVE SIGNED LABOR AGREEMENTS WITH BCTC MEMBER UNIONS**
4 **INCREASE CON ED'S FUTURE CONSTRUCTION COSTS?**

5 A. Although we do not know for sure what future costs will be, we do know that our NYICA
6 member companies already have signed labor agreements with a legally formed union
7 who Con Ed approved of as evidenced by the fact that the company invited our
8 contractors back to bid over and over again. These labor agreements must stay in place until
9 they expire, meaning that our contractors will have to pay health, pension and annuity
10 benefits to that union for the duration of that contract whether they use their labor or not.
11 If Con Ed forces our contractors to sign a second labor agreement with a BCTC member
12 union, our contractors will have to pay health, pension and annuity benefits to two unions
13 at once which will drive up the cost of doing work for Con Ed and no doubt be reflected
14 in their bids.

15 Though we do not know what other companies bid for work because Con Ed does not
16 make that information available, it is reasonable to assume that the NYICA-member
17 companies have historically won Con Ed contracts because they offer Con Ed either
18 lower prices, higher quality or greater reliability of work, if not all three, than the BCTC-
19 member companies.

20 If those prior winning bidders are now excluded from being awarded bids utilizing labor
21 from the non-BCTC union they are currently signed with, it is likewise reasonable for the
22 PSC to assume that the remaining pool of eligible BCTC-member companies consistently
23 submitted bids that offered Con Ed either *higher* prices, *lower* quality or *less* reliability of
24 work than the previous winning bidders.

25 If that were not the case, then Con Ed would already have been awarding bids to the
26 BCTC companies, regardless of existing competition from NYICA companies. To the
27 contrary, it would seem that the only way for BCTC member companies to win the bids
28 is to eliminate competition from NYICA companies by having Con Ed declare NYICA
29 companies ineligible to be awarded contracts while signed with a non-BCTC member
30 union.

1 It is therefore reasonable for the PSC to be concerned that if Con Ed eliminates
2 competition from NYICA-member companies who historically have consistently
3 submitted winning bids for Con Ed construction work, and entertains bids only from
4 companies who have signed labor agreements with only BCTC-member unions who
5 previously were unable to win the bids on their merits, Con Ed's future construction costs
6 will increase.

7 And if the PSC approves the Joint Proposal with Section E-2 language as it stands now,
8 those increased costs will be passed on to the ratepayers.

9 **Q. CAN YOU BRIEFLY EXPLAIN THE EXACT CHANGE THAT HAS BEEN**
10 **MADE, AND WHY YOU BELIEVE IT WILL BAR NYICA COMPANIES FROM**
11 **BEING AWARDED FUTURE CON ED WORK?**

12 A. In the past, Con Ed's Standard Terms and Conditions required contractors to have signed
13 labor agreements with union members of a building trades organization in order to be
14 eligible to be awarded a contract. Con Ed recently changed its contract language to
15 require contractors to have signed labor agreements with unions who have membership in
16 only one specific building trades organization, the BCTC.

17 For the past 12 years, the employees of NYICA member companies have elected to be
18 represented by United Plant and Production Workers ("UPPW") Local 175, which is a
19 legally formed labor union that is a member of the Empire State Building Trades Council.
20 Under the prior Standard Terms and Conditions, these companies were eligible to be
21 awarded contracts. Under the new Standard Terms and Conditions, they are not eligible
22 to be awarded contracts unless they sign a second labor agreement with a BCTC member
23 union whose work is unfamiliar to our contractors and unfamiliar to Con Ed since Local
24 175 has been performing the work for the past 12 years.

25 **Q. WHY CAN'T LOCAL 175 BECOME A MEMBER OF THE BCTC SO THEIR**
26 **CONTRACTORS CAN BE DEEMED ELIGIBLE TO BE AWARDED A CON ED**
27 **CONTRACT UNDER THE NEW TERMS AND CONDITIONS?**

28 A. To protect its existing member companies from lawful competition, the BCTC disfavors
29 membership by multiple unions doing the same work. Because BCTC already has a

1 member union that claims to do the same construction work as Local 175, it has refused
2 to permit UPPW Local 175 to become a member of the BCTC.

3 Together, Con Ed's decision to award contracts only to BCTC-member companies, and
4 the BCTC's decision to protect its existing members' market share by denying
5 membership to NYICA-member companies, have the combined effect of insulating
6 BCTC-member companies from competition from NYICA-member companies for
7 Con Ed contracts, at the expense of Con Ed ratepayers, who will be responsible for
8 paying increased costs for construction related to MIS.

9 **Q. WHEN WILL THIS CHANGE TAKE EFFECT?**

10 A. Con Ed changed its contract language in 2014. As existing multi-year construction
11 contracts expire, we expect that the first contracts under the new language will be bid,
12 awarded and executed by 2017.

13 2017 is also the first rate year in which rate payers will be responsible to incur additional
14 costs if Con Ed spends above the target it set for MIS work.

15 **Q. TO TURN TO YOUR SECOND POINT, SHOULD THE PSC FEEL CONFIDENT**
16 **THAT CON ED WILL BE A RESPONSIBLE STEWARD OF INTERFERENCE**
17 **COSTS IF THE PSC ALLOWS CON ED TO PASS SIGNIFICANT COST**
18 **OVERRUNS TO THE RATEPAYER?**

19 A. No.

20 **Q. WHY NOT?**

21 A. NYICA has repeatedly asked Con Ed, both through formal and informal channels, to
22 explain the reason for changing its Standard Terms and Conditions to exclude from
23 being awarded future contracts using labor from non-BCTC member unions, the very
24 companies on which Con Ed has relied for decades for cost-effective, quality and reliable
25 work. We have never received an answer. Because Con Ed has never articulated a valid
26 business purpose for the change, and the change seems likely to increase Con Ed's future
27 construction costs, we can only conclude that Con Ed's motivation is political, not
28 financial.

1 The PSC should reasonably be concerned that Con Ed has demonstrated a willingness to
2 pay increased construction costs that have no legitimate business purpose, confident in
3 the knowledge that it will be able to pass on some or most of its future increased MIS
4 costs to the ratepayer.

5 **Q. WOULD IT BE REASONABLE FOR THE PSC TO ASSUME THAT CON ED**
6 **RESTRICTED COMPETITION TO BCTC-MEMBER COMPANIES BECAUSE**
7 **THE NYICA COMPANIES ARE NO LONGER SUBMITTING THE MOST**
8 **DESIREABLE BIDS?**

9 A. No. If that were the case, Con Ed would simply award the contract to a different
10 company with a better bid. Instead they are instructing our contractors to sign second
11 labor agreements with a BCTC member union in order to be awarded the contract as
12 evidenced by Exhibit 3 - the Sebastopolis email. Again, paying health, pension and
13 annuity benefits to two unions at once creates a financial hardship for our member
14 companies.

15 **Q. WOULD IT BE REASONABLE FOR THE PSC TO ASSUME THAT CON ED**
16 **RESTRICTED COMPETITION TO BCTC MEMBER COMPANIES TO**
17 **REDUCE THE POSSIBILITY OF LABOR UNREST BY USING COMPANIES**
18 **WHO ARE AFFILIATED WITH THE SAME BUILDING TRADES**
19 **ORGANIZATION?**

20 A. No. Over the past 12 years, no NYICA company has ever experienced a labor dispute or
21 work stoppage affecting a Con Ed contract. There was no labor unrest to eliminate.

22 **Q. DO YOU KNOW OF ANY OTHER FACTS SUGGESTING THAT THE PSC**
23 **CANNOT RELY UPON CON ED TO MINIMIZE ITS FUTURE INTERFERENCE**
24 **COSTS?**

25 A. Yes. Exhibit 4 – shows that the PSC recently announced that Con Edison agreed to pay \$
26 171 million in fines because of collusion between a Con Ed approved contractor and the
27 company's own inspectors. Crimes were committed and the rate payers were being
28 defrauded by a Con Ed approved contractor. Now, Con Ed wants to enter into an

1 exclusive agreement to only use BCTC companies some of whose employees were
2 involved in the wrongdoing.

3 **Q. IN LIGHT OF THESE ISSUES, WHAT ACTION DO YOU BELIEVE THE PSC**
4 **SHOULD TAKE TO PROTECT THE RATE PAYERS?**

5 In order for this Joint Proposal and its signatories to truly protect the rate payer from the
6 likelihood of having to pay an additional \$22.8 million dollars if Consolidated Edison
7 exceeds its target for MIS, we recommend that the PSC should either:

8 1) Deny Con Ed's request to pass along MIS costs to the rate payer if it exceeds its target
9 number due to its own actions, or

10 2) As a condition of approving the Joint Proposal as written, require Con Ed to revert to
11 its pre-2014 Standard Terms and Conditions, under which companies were eligible to bid
12 on Con Ed contracts as long as they belonged to any building trades council, not just the
13 BCTC. Imposing this condition would benefit the ratepayers by:

14 a) increasing the PSC's confidence in Con Ed's budget for future Interference Work, by
15 eliminating a major change that undermines the reliability of that estimate;

16 b) maximizing competition for Con Ed construction contracts, thus ensuring Con Ed's
17 Interference work is performed by companies offering Con Ed and its ratepayers the
18 lowest cost, highest quality, and greatest reliability of service;

19 c) eliminating a forced and inefficient turnover in Con Ed's construction workforce, as large
20 numbers of veteran companies and workers are excluded from being awarded work
21 starting in 2017, forcing Con Ed to hire new companies and workers without prior Con
22 Ed experience;

23 d) reducing opportunities for increased Interference costs through collusion and corruption
24 between Con Ed and contractors who have signed labor agreements with BCTC member
25 unions and whose employees have been found guilty of such collusion before; and

26 e) sending a strong and clear message to Con Ed that if it wants to pass along its expenses to
27 ratepayers, the PSC will require Con Ed to make contract decisions that are based on
28 business considerations that provide the highest value for New York ratepayers, not on
29 political considerations.

1 **Q. WHY DO YOU BELIEVE THE PSC SHOULD TAKE SUCH ACTIONS?**

2 A. The PSC is the gatekeeper between Con Ed and New York ratepayers, and should impose
3 whatever conditions are necessary to ensure the ratepayers' interests are protected.

4 Before agreeing to Con Ed's requested rate increase, the PSC must insist that Con Ed
5 provide transparency in its bidding process, utilize bidding Terms and Conditions that
6 ensure maximum competition rather than favoring one group of bidders for non-business
7 purposes, and assure the PSC (and the public) that it is no longer colluding with private
8 companies at the ratepayer's expense.

9 **Q. DOES THIS COMPLETE YOUR PREFILED TESTIMONY?**

10 A. Yes.