

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

---

- CASE 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 16-G-0061 - 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 15-E-0050 - 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 16-E-0196 - Tariff filing by Consolidated Edison Company of New York, Inc. to Revise General Rule 20 Standby Service contained in its electric tariff Schedules, P.S.C. Nos. 10 and 12.
- 

**POST HEARING MEMORANDUM OF THE  
NEW YORK INDEPENDENT CONTRACTORS ALLIANCE**

Submitted By:

ROBINSON BROG LEINWAND GREENE  
GENOVESE & GLUCK P.C.  
875 Third Avenue, 9th Floor  
New York, NY 10022  
Telephone: (212) 603-6300  
*Attorneys for New York Independent  
Contractors Alliance*

Dated: November 16, 2016  
New York, New York

## PRELIMINARY STATEMENT

This Post Hearing Memorandum is respectfully submitted in support of the New York Independent Contractor Alliance's ("NYICA")<sup>1</sup> contention that the imprudent change in Article 14 of Con Ed's Standard Terms and Conditions ("STC") will cause a reduction in competition, which will result in an unnecessary increase in Municipal Infrastructure Support O & M expenses during the term of the Rate Plan (i.e. 2017-2019), that will be assessed against the company's rate payers.

Construction contracts are competitively bid by privately owned companies and typically provide pricing for a three year period. In creating its target budget, Con Ed used the historical contract pricing that was submitted by the NYICA contractors, who were awarded all of the asphalt paving contracts from 2009 to 2015 in the five boroughs of New York.<sup>2</sup> However, on October 15, 2014 Con Ed materially changed its STC from permitting contractors to use union labor from any building trade local having jurisdiction over the work, to requiring contractors to use labor only from building trade locals affiliated with the Building & Construction Trades Council of Greater New York ("BCTC"), a lobbying organization registered in New York. Con Ed's rationale for implementing this change is that, in order to resolve any "**POTENTIAL**" job site labor disputes that could cause delay or disruption to its projects, contractors needed to employ union labor that was affiliated with the BCTC who had jurisdiction over such labor and,

---

<sup>1</sup> NYICA is a trade association consisting of approximately 100 contractors who have signed a collective bargaining agreement with Local 175 of the United Plant and Production Workers Union ("Local 175"). Local 175 is affiliated with the Empire State Building Trades Council.

<sup>2</sup> Con Ed has admitted that its historical construction budget costs are not always a reliable indication of future expenses (Page 54, Nov. 2 Hearing Transcript). Con Ed's historical asphalt paving costs are especially unreliable because they are based on the contract prices of NYICA contractors from 2012-2015, who under the current STC are no longer eligible to be awarded future contracts. As a result of their experience in performing all of Con Ed's asphalt paving contracts from 2009-2015 in the five boroughs of New York City and their lower labor costs, their ability to perform such contracts is demonstrably lower than Local 1010 contractors.

therefore, could resolve the labor dispute (See Exhibit 312 at p. 4). This rationale is a transparent pretext to justify this imprudent and politically motivated decision. Con Ed appears to have capitulated to the demands of the BCTC to change its STC which effectively gives its member unions a virtual monopoly on performing all asphalt construction projects valued annually at approximately \$100 million in the five boroughs of New York City.

The imprudent change in Con Ed's STC is 1) patently contrary to Recommendation IV-5 of the Con Edison/O&R Management Audit Report (Case 14-M-0001) that Con Ed increase its level of competitive procurement of materials and services in order to improve cost performance, 2) contrary to Con Ed's contention, that the current STC is necessary to resolve jurisdictional labor disputes that have caused on-site delay and disruption to Con Ed's projects between contractors who employ labor from different unions claiming jurisdiction over the same work, because there has **NEVER** been such disputes on a Con Ed jobsite involving a NYICA contractor and all such labor disputes have always been resolved either at the NLRB or in federal district court; and 3) contrary to and inconsistent with Con Ed's procurement policy that claims to be fair, transparent and awards contracts based on merit rather than fraud or favoritism.

**A. CON ED'S CURRENT STC WILL CAUSE A SIGNIFICANT REDUCTION OF COMPETITIVE BIDS FROM NYICA CONTRACTORS.**

A significant component of a contractor's bid for a construction contract is the wages and benefits it is required to pay its workforce. The workforce of NYICA's contractors have voted to be represented by Local 175, and therefore are contractually required to remit benefit contributions into Local 175's annuity, welfare, pension and education funds for every contract that they acquire. However, as a condition to now being awarded a Con Ed contract, Local 175 contractors are required under the current STC to employ labor only from unions that are

affiliated with the BCTC i.e. Local 1010 and therefore, will also be required to remit contributions into Local 1010's annuity, pension, welfare and education funds.<sup>3</sup> The dual benefit contributions that NYICA contractors will be required to make into the Local 175 and Local 1010 Funds will significantly increase their labor costs and, therefore, effectively preclude them from ever being able to submit a competitive bid to Con Ed. Knowing that they are unable to submit a competitive bid, NYICA contractors will eventually stop wasting their time and resources bidding on any future contracts. By requiring contractors to only use union labor from the BCTC, Con Ed will increase construction costs by also requiring multiple unions to perform the same work that Local 175 has historically performed itself. Thus, the reduction in competition caused by the imprudent change in Con Ed's STC will likely lead to unnecessary construction costs, which may be recoverable by Con Ed under the Joint Proposal from the rate payers. The adverse impact of these cost overruns is not speculative or hypothetical. Rather, it reflects the irrefutable economic realities of competitive bidding in the construction industry.

**B. CON ED'S ALLEGED RATIONAL FOR ITS STC IS BASELESS, UNPERSUASIVE AND UNFAIR TO CON ED'S RATE PAYERS.**

Con Ed attempts to justify its current STC because it claims that NYICA contractors may be "overstepping" their jurisdiction into areas beyond paving, "which may cause Con Ed to become "embroiled" in jurisdictional labor disputes between Local 175 and other labor unions that may "disrupt or delay" work on their projects (See Exhibit 312 at p. 4). Con Ed contends that if only unions that are affiliated with the BCTC work on its projects, the BCTC can resolve

---

<sup>3</sup> (See A.S.C. Contracting v. Local Union 175 Welfare Fund – 08 Civ 2504, where the Federal District Court in the Eastern District of New York, held that a contractor that signed collective bargaining agreements with Locals 175 and 1010 was responsible for contributing benefits into the benefit funds of **BOTH** unions even though such payments would "double" its labor costs and could "kill the goose that lays the golden egg.").

any labor disputes that may arise and thus, achieve jobsite labor harmony. (See Exhibit 312 at p .4).

However, Con Ed admits that there has **NEVER** been a jurisdictional dispute involving a NYICA contractor that has caused disruption or delay on their jobsite and that their concern is merely based on the "**POTENTIAL**" for such jobsite labor unrest. Con Ed also ignores the labor dispute resolution process that is currently contained in its STC, which requires contractors to utilize "all remedies available under applicable collective bargaining agreements and applicable Federal and State laws to resolve the dispute and end the adverse effect on the work, including but not limited to, seeking an injunction and filing an unfair labor practice charge." (See Exhibit 189 at p. 14). Thus, Con Ed alleged "justification" for the imprudent change in its STC is unsupported by the evidence and contrary to the facts concerning the labor harmony that has historically existed on its jobsites.<sup>4</sup>

Con Ed urges the PSC to "follow its long standing precedent of non-intervention in labor matters" by not taking sides with either NYICA or the BCTC on this issue. However, by approving the Joint Proposal and Con Ed's current STC, the Commission will be placing itself squarely in the center of this labor dispute by deciding that every contractor who is awarded an asphalt paving contract **MUST** use labor from a BCTC union, such as Local 1010. The Commission's position of "neutrality" in labor disputes will thus be significantly compromised at the expense of the rate payers that it is responsible for protecting. By approving Con Ed's imprudent STC bidding practices, in the context of approving the Joint Proposal, the

---

<sup>4</sup> In 2007 the NLRB certified Local 175 as the exclusive bargaining agent of asphalt pavers within the jurisdiction of the five boroughs of New York (NLRB Case 29-RE-11227). Con Ed accepted the NLRB's decision and has approved contractors using labor from Local 175 until recently. Inexplicitly, Con Ed now seeks to replace the NLRB with the BCTC to resolve all jurisdictional labor disputes, and rejects union labor from Local 175 working on its contracts which raises the issue of whether political favoritism or worse, is motivating their decision.

Commission will effectively be putting its thumb directly on the scales of justice, at the expense of the rate payers.

It is respectfully submitted that the PSC should protect Con Ed's rate payers in the same manner that the Federal and State procurement regulations protect taxpayers. The PSC should demand that as a condition for approving the Joint Proposal, Con Ed be required to implement a procurement policy and STC that are transparent, encourages rather than impedes competition, guards against favoritism and corruption and does not impose unfair burdens or expenses on the rate payers.

**C. CON ED'S RATE PAYERS WILL BE PREJUDICED IF CON ED IS PERMITTED TO IMPLEMENT ITS PROCUREMENT PROGRAM THROUGH THE CURRENT STC.**

From 2009 to 2015, Con Ed awarded all asphalt paving contracts in the five boroughs of New York City to NYICA contractors because they were the most qualified and experienced contractors, and could perform the contracts in the most cost effective manner for the rate payers. However, Con Ed has recently demonstrated its propensity for favoritism or worse, and willingness to ignore the principles embedded in its procurement policies at the expense of the rate payers.

Con Ed's 2015 Manhattan asphalt paving contract was originally awarded to NICO Asphalt Paving, Inc. ("NICO"), a NYICA contractor, who since 2009 had been performing this contract. However, after awarding the contract to NICO, and initiating the purchase order, and after NICO's Local 175 workforce had been working on the project for approximately one month, Con Ed advised NICO that the only way it could keep this contract was if it complied with the STC and used union labor from a local i.e. Local 1010 that was affiliated with the BCTC (See Exhibit 3 to Kilkenny's Direct Testimony). The Manhattan asphalt paving contract {00822081.DOC;3 }

was the first contract that had been awarded after Con Ed changed its STC. Not wanting to lose this contract, NICO formed on December 15, 2015, Citywide Paving, Inc. ("Citywide") and assigned the contract to its alter ego. Con Ed undoubtedly knew that awarding this contract to Citywide, violated its own procurement policy because Citywide 1) was not preapproved as all other contractors are required to be, and was not invited to bid on the contract as were the other five contractors who submitted bids; 2) had no prior experience of performing asphalt paving or any other type of contract for Con Ed, or any other party, and was formed solely to be awarded this contract without having any contractual obligations to remit benefit contributions into Local 175's benefit Funds; and 3) did not even submit a bid, as all other contractors competing for contracts are required.

Awarding this contract to Citywide, under these circumstances creates the appearance of favoritism and fraud which is diametrically contrary to the objectives Con Ed's procurement policies are intended to achieve. If NICO was not in compliance with Con Ed's STC, the obvious question that must be asked and answered is – why wasn't this contract awarded to one of the other five companies that were invited by Con Ed to bid and had submitted bids on this project. Instead, Con Ed imprudently awarded this job to a newly formed company, that was not preapproved, and was required to use laborers who were unqualified and inexperienced. This imprudent decision creates the very real possibility of unnecessary cost overruns, that potentially will be the rate payers responsibility for paying under the Joint Proposal on this and other construction contracts.

Through Con Ed's current STC, the pool of contractors who are eligible to be awarded asphalt paving contracts will now be significantly limited to only those contractors who use union labor from locals that are affiliated with the BCTC. NYICA's contractors, who have been

awarded every asphalt paving contract since 2009 because of the price of their bid and the quality of their work, will no longer be able to submit competitive bids and will no longer be eligible to be awarded asphalt paving contracts. The result of permitting Con Ed to implement the current STC for contracts during the 2017 to 2019 Rate Period, will inevitably cause unnecessary increases in asphalt paving costs at the expense of the rate payer. The increase in these costs is being driven by the imprudent change in the terms of the STC. Given the well documented history of Con Ed managers circumventing the procurement process and committing imprudent actions that have increased construction expenses, the Commission should require Con Ed to follow a bidding process for construction contracts that is transparent, fair, and protective of the rate payers' interests. The most effective way to achieve this objective is to open bidding and award contracts to qualified contractors, irrespective of their local labor union affiliation.<sup>5</sup>

**D. CON ED'S OPPOSITION TO NYICA'S POSITION IS FLAWED, MISLEADING AND DEMONSTRABLY UNPERSUASIVE**

Con Ed has asserted several arguments in opposition to NYICA's position for open and fair competition. These arguments are demonstrably false and misleading. First, Con Ed has argued that it contracts with companies not unions, and that the STC does not exclude any contractor from "bidding on their work." (See Con Ed's Reply Statement in Support of Electric

---

<sup>5</sup> On January 14, 2009 the United States Attorney for the Eastern District of New York arrested 11 Con Ed managers for criminally accepting over one million dollars in bribes and kickbacks in exchange for Con Ed paying inflated claims by Felix Associates, a BCTC contractor. This case raised the specter of imprudence concerning Con Ed's expenditures and gave rise to a prudence proceeding that considered, *inter alia*, Con Ed's contractor selection process. This case precipitated an internal investigation that found that Con Ed's imprudent administration of its internal controls caused rate payers harm due to fraud, waste and abuse (See Case 09-M-0243 and Case 09-M-0114). The change in Con Ed's STC, which will reduce competition and provide the BCTC with a virtual monopoly on the labor that is used on their construction contracts, creates the same potential for fraud, waste and abuse as in the Felix Associates case, that potentially may also harm the rate payers.

and Gas Joint Proposal at p. 21). This argument is misleading because NYICA contractors do not merely seek the right to submit a bid, they seek a full and fair opportunity to be awarded a contract notwithstanding the union labor that they use to perform the contract. Common sense suggests that, rate payers are less concerned about whether a contractor is using labor from a particular union, as opposed to whether the work that is being performed is performed in a timely and cost effective manner, and whether they will be responsible for paying unnecessary costs that were caused by the imprudent modification of the company's STC.

Second, Con Ed has argued that NYICA has failed to submit any evidence demonstrating that NYICA contractors cost of employing Local 175 members is less than the cost of employing members of Local 1010, inasmuch as all contractors are required to pay "the prevailing rate of wages and benefits under the New York Labor Law" to all workmen who perform work on a Con Ed asphalt paving contract. Con Ed misapprehends NYICA's argument. NYICA contractors assert that under the current STC they are required to use labor from Local 1010 which is affiliated with the BCTC and, therefore, will be required to make "contributions" to the funds of **BOTH** unions. Accordingly, the NYICA contractors, who have historically performed all of Con Ed's asphalt paving contracts since 2009 and are the most qualified and experienced asphalt paving contractors, justifiably believe that they will be unable to submit a competitive bid on a Con Ed construction contract. Thus, the enforcement of the current STC will inevitably result in less competition among those contractors bidding for Con Ed work which is contrary to Con Ed's procurement policies and is likely to result in unnecessary cost overruns that the rate payers may be responsible for paying under the Joint Proposal.

Third, Con Ed has argued that assuming *arguendo* it could be demonstrated that future paving costs will be higher because of the STC, there is no basis for assuming that the higher

costs would be “imprudent expenses.” This argument is also false and misleading.<sup>6</sup> While Con Ed has the discretion to award a construction contract to a contractor other than the lowest bidder, it should not be permitted to 1) abuse its discretion by unfairly limiting the pool of contractors eligible to be awarded contracts solely on the basis of union affiliation; 2) show favoritism or be motivated by fraud or corruption in awarding their contracts; or 3) arbitrarily reject all of the contractors who have historically been awarded all of the asphalt paving contracts in the five boroughs of New York since 2009 who have acquired the skill, experience and knowledge to perform the contracts on time and within budget, simply because of their union affiliation which has never been an impediment, burden or problem to Con Ed prior to the 2014 STC. Simply stated, expenses are always imprudent if they are unnecessarily and improperly incurred!

Fourth, Con Ed has argued that assuming *arguendo*, that the current STC results in increased paving expenses, a reasonable amount that may be borne by its customers pursuant to E-2 of the Joint Proposal is *de minimus*. The true cost (See Con Ed's purchase order found on DPS website <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B41E377F0-7CC5-472E-9676-402AAB1EC192%7D> at p. 251) differentiated between the 2012 and 2015 purchase orders is \$13,330,000 which even if only partially attributed to MIS work, will have a significant impact on the target budget. Con Ed's argument is indicative of the insensitivity of this utility giant who makes hundreds of millions of dollars in profits from the utilities it sells to its rate paying customers. Thousands of Con Ed rate paying customers live "hand to mouth," and work

---

<sup>6</sup> Con Ed has misrepresented the actual cost of the 2012 Manhattan paving contract in its response to the staff's interrogatory, (See Exhibit 312). The purchase order (4062941) for this project which is found on the DPS website, reflects a price of \$20,5000.00, not \$33,880,000 as represented in Con Ed's answer to DPS interrogatory (See Exhibit 189).

multiple jobs to support their families and meet their daily financial obligations. Any increase in the cost of utilities that they receive which is caused by Con Ed ignoring its procurement policies and implementing its current anti-competitive STC, is neither fair, nor in the rate payers' best interests.

**CONCLUSION**

While it is undeniable that NYICA and the BCTC have competing interests concerning the applicability of Con ED's current STC, it is equally beyond peradventure that the implementation of the current STC will reduce competition by eliminating all contractors who historically were awarded all Con Ed asphalt paving contracts since 2009, which will likely cause an unnecessary increase in asphalt paving construction expenses. It is imprudent for Con Ed to have changed its STC, because this modification impedes rather than furthers the objectives of Con Ed's procurement policies. Therefore, it is respectfully requested that, to the extent the Joint Proposal is recommended for approval to the Commission, such approval should be conditioned on the current STC being rescinded and the old STC being reinstated, which will further competition, reduce construction costs and protect the company's rate payers from being responsible for paying unnecessary expenses that were imprudently caused by Con Ed.

Dated: New York, New York  
November 16, 2016

Respectfully submitted,

ROBINSON BROG LEINWAND GREENE  
GENOVESE & GLUCK P.C.

By:



---

Alan M. Pollack  
875 Third Avenue, 9th Floor  
New York, NY 10022  
Telephone: (212) 603-6300