



Department of Public Service

Public Service Commission

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Three Empire State Plaza, Albany, NY 12223-1350
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August 19, 2020

VIA EMAIL & US MAIL

Richard Miller, Esq.
Consolidated Edison of NY, Inc.
Law Department
4 Irving Place - RM 1875
New York, NY 10003

Re: Notice of Apparent Violations Related to Tropical Storm Isaias

Dear Mr. Miller:

This letter is to notify Consolidated Edison of New York, Inc. (Con Edison) that, based on the initial investigation undertaken by the Department of Public Service (Department), Con Edison is in apparent violation of the State Public Service Law (PSL) and associated regulatory authority based on its wholly inadequate response to the August 2020 Tropical Storm Isaias. As detailed below, the Department's initial investigation shows that Con Edison apparently failed to follow its Public Service Commission-ordered Emergency Response Plan's (ERP) requirements relating to: (1) its damage assessment responsibilities; and (2) its published Estimated Time of Restoration (ETR) notices. This Notice also provides a series of corrective actions that Con Edison must implement immediately to mitigate the still-existing severe threats to public health and safety crises resulting from Con Edison's inactions and to prevent any potential failings in case of another significant storm event this year.

A. Law Governing the Apparent Violations

The Commission has significant legal authority to investigate and ensure utilities meet their regulatory obligation to provide electric, natural gas, and/or telecommunications services in a safe, adequate and reliable manner, including during storm and other outage events. PSL §§ 65(1), 66(2). The Department's oversight responsibility for utilities' emergency response actions occurs

in three phases: storm preparation, active monitoring of utility impacts and system restoration, and post-storm analysis. To ensure that electric utility companies are fully prepared, PSL § 66(21)(a) and 16 NYCRR Part 105 require each major electric utility to submit a comprehensive ERP to the Commission. The ERPs detail procedures and define roles, responsibilities, and required training to reduce confusion and promote a common understanding of the restoration process. The ERPs are annually reviewed by the Department and approved by the Commission. PSL § 66(21). Under Part 105, each utility is also required to perform restoration efforts in compliance with its ERP and is expected to update its plan after a major event to capture all lessons learned and incorporate all best practices.

PSL §§ 25-a(3) and (5) authorize the Commission to commence an administrative penalty proceeding against Con Edison to determine, by a preponderance of the evidence, whether the corporation violated the PSL or an order or regulation adopted pursuant to the PSL. Pursuant to PSL § 25-a(5), a finding of violation may warrant a Commission-assessed penalty against Con Edison based on a determination that the company “failed to reasonably comply by a preponderance of the evidence with a provision of this chapter, or an order or regulation adopted under authority of this chapter, designed to protect the overall reliability and continuity of electric service, including but not limited to *the restoration of electric service following a major outage event or emergency.*” (Emphasis added).

Based on a finding of violation by the Commission, Con Edison would be required to forfeit as much as:

five hundred thousand dollars or four one-hundredths of one percent of the annual intrastate gross operating revenue of the corporation, not including taxes paid to and revenues collected on behalf of government entities, whichever is greater, constituting a civil penalty for each separate and distinct offense; provided, however, that for purposes of this paragraph each day of a continuing violation shall not be deemed a separate and distinct offense.

PSL § 25-a(5)(a). Pursuant to this provision, “[t]he total period of a continuing violation, as well as every distinct violation shall be similarly treated as a separate and distinct offense for purposes of this paragraph.” *Id.*

The Commission may also seek to initiate an action in Supreme Court to assess civil penalties under PSL § 25(4), based upon a finding that Con Edison or its agents or employees “knowingly fail[ed] or neglect[ed] to obey or comply with a provision of this chapter, or an order or regulation adopted under authority of this chapter, designed to protect the overall reliability and continuity of electric service.” The Commission’s civil penalty authority under Section 25 is also significant, authorizing a sum of “five hundred thousand dollars constituting a civil penalty for each separate and distinct offense; provided, however, that for purposes of this paragraph each day of a continuing violation shall not be deemed a separate and distinct offense.” PSL § 25(4)(a). “The total period of a continuing violation, as well as every distinct violation, shall be similarly treated as a separate and distinct offense for purposes of this paragraph.” *Id.* The Commission may also seek injunctive relief in such a court action. PSL § 26.

Finally, and particularly pertinent here, PSL § 68(2) authorizes the Commission to revoke or modify utility certificates to operate “based on findings of repeated violations of this chapter or rules or regulations adopted thereto that demonstrate a failure of such corporation to continue to provide safe and adequate service.” As you are aware, this is not the first time that the Commission has deemed Con Edison’s response to a major storm event to be inadequate, and the Department intends to specifically determine as part of its investigation whether Con Edison’s failures at issue here warrant revocation of its Certificate.

B. Apparent Violations

Tropical Storm Isaias first appeared in Con Edison’s service territory on Tuesday afternoon, August 4, 2020 in the form of severe winds and rain. Throughout the afternoon and into the first evening of the storm, the Con Edison service territory experienced winds gusting to 70+ mph, with sustained winds of 40+ mph for over five hours, causing severe damage to trees, poles and conductors. Peak outages in New York State due to Tropical Storm Isaias reached approximately 920,000 customers, and approximately 1.3 million New York customers experienced power outages during this event. By the evening of Thursday, August 6, 2020, the Department understands that Con Edison had experienced 328,555 customer outages. At this point, the Department has determined that Con Edison was not prepared for the storm and failed to follow many aspects of its ERP.

We highlight two apparent violations below based on the Department’s initial investigation. The Department believes that these apparent violations constituted, in whole or in part, material reasons why Con Edison was unable to timely restore service to all customers, which, according to Con Edison’s restoration website, continued until August 12, 2020, eight days after the storm struck New York.

1. Damage Assessments

The Department understands from information and through its initial investigation that Con Edison’s pre-storm crewing assessments were inadequate for the magnitude of Isaias’ impacts. Storm impacts of downpours, wind, flooding and other weather events were predicted in meteorological reports across the country days before the storm hit Con Edison’s service territory. Nonetheless, Con Edison’s preparations were inadequate to address the impacts; this appears most clearly evidenced by Con Edison’s multiple requests for increases in resources following the impacts of the storm. At the very earliest stages of the storm, as detailed below, Con Edison identified that it needed more line worker resources than were available from the North Atlantic Mutual Assistance Group (NAMAG) mutual aid process. Con Edison should have pursued those additional resources from any means possible, including additional contractor personnel to the extent required. The Department’s initial investigation revealed that it apparently failed to do so. As an example, on Tuesday, August 4, 2020 Con Edison requested 1200 FTE line workers on the 8:00 P.M. NAMAG call; however, NAMAG assigned Con Edison only twenty-one line workers, *leaving the company with an open request of 1,179 line workers that it believed it needed to address customer storm impacts.* Con Edison, on that same day, was able to secure only an additional 238 contracted line workers, and ninety-three more the next day. These figures, and

the others identified in the Department's initial investigation, appear to demonstrate that Con Edison failed to properly assess, prepare for and respond to Tropical Storm Isaias, and, its ERP.

Con Edison's ERP at Section 9.2 (Determining the Incident Classification) assigns specific internal personnel for storm level classification; each increasing level requires accompanying greater preparation, resources and anticipated response. This storm level determination is made through an internal review of available information with reference to classification metrics, such as wind speed. The Department's initial investigation identified, and Con Edison's storm response appears to confirm, that Con Edison failed to properly classify the predictable storm impacts in a timely manner, which resulted in a failure to then properly assess crewing requirements. The lack of sufficient crews triggered extended customers outages that might have been otherwise avoided.

2. Inaccurate Estimated Times of Restoration

An estimated time or restoration or "ETR" is the approximate date and time an electric utility expects service will be restored after a power outage. Customers depend on ETRs to make health and safety decisions, including determining the need for alternative accommodations, ensuring adequate resources and supplies are available during extended outages, and addressing any medical needs. Further, municipalities rely on ETRs to plan accordingly for the care and safety of their constituents and protection of property. To be useful and informative, the ETRs must be timely, accurate, and made widely accessible. An inaccurate ETR does not benefit the customers or municipalities and, taken to the extreme, can lead to personal injury or even death. Therefore, an ETR must be accurate to satisfy the intent of a utility ERP. In addition, companies must train on and integrate communication systems and test their functionality. 16 NYCRR §105.4(b)(4), (7), (10).

The Department's initial investigation revealed that Con Edison's municipal-level ETRs were inaccurate, conflicting or unavailable. Under Con Edison's ERP at Section 12.5 (Management and Communications of Estimated Times or Restoration), all ETRs are reviewed regularly on conference calls initiated by the Regional ETR Officer to ensure that they represent accurate restoration times. When customers click on shaded areas of Con Edison's specific Borough/County or Municipality map, the ETR displayed on the information panel indicates the latest time the company believes customers will be restored in that Borough/County or municipality. Leaders of certain municipalities, such as the towns and/or boroughs of Bedford, Bronxville, Rye, and Queens, informed the Department that Con Edison's map failed to provide them with accurate or non-conflicting town- and city-level ETR information, resulting in municipalities being unable to coordinate efforts to ensure the restoration of service. Customers also complained about multiple examples of inaccurate ETRs.

The Department also continues to investigate whether Con Edison's manual input of ETRs into its Outage Management System or "OMS" was due to its failures or improper operation. Further alleged violations may be forthcoming based on the results of that investigation.

C. Demand for Relief

Based on the apparent violations identified above, the Department demands that Con Edison immediately implement the following remedial action items both to mitigate the existing public health crises resulting from the company's delay in restoring service and to prevent any future delays.

- Immediately begin the process of adding crewing capacity via retainer contracts from private contractors or utilities located outside of New York, with a goal to be able to secure sufficient crewing to double your existing internal capacity, and report bi-weekly to the Department on your crewing capacity for the remainder of the 2020 calendar year;
- Develop other plans to secure utility crews in addition to private contractor and mutual aid provided by the NAMAG before and during storms, and report bi-weekly to the Department on your progress for the remainder of the 2020 calendar year;
- Test capabilities at all command and data centers, call centers and back-up command centers to ensure capability to handle an outage impacting 90% or more of your customers in the Con Edison service territory and provide confirmation back to the Department regarding the results of this test within 10 days;
- Refine coordination plans with municipalities tailored to each county (road clearing, local liaisons, etc.) and provide to the Department within 20 days a written confirmation from each county Emergency Operations Center that they understand and accept the plan; and
- Update Life Support Equipment and Critical Infrastructure lists to remove or add customers as necessary and file such updated lists to the Department within 10 days.

Should Con Edison fail to undertake these actions immediately or within the time frames identified above, the Department will not hesitate to seek any and all relief to compel such actions.

Additionally, the Department believes that, based on the apparent violations identified above, as well as those that it may find as a result of its ongoing investigation, Con Edison is liable for violating its ERP and thus must pay civil penalties in accordance with PSL § 25 and/or § 25-a. Please be aware that the Department intends to supplement this Notice at the end of its investigation to provide a full accounting of apparent violations and the associated penalties regarding the same. The Department otherwise reserves all rights to seek additional injunctive relief, including to revoke Con Edison's Certificate to Operate should it determine that the violations alleged continue a pattern of failure already established by the company's violations in response to prior storms.

Should you have any questions regarding this Notice, I can be reached at the below address.

Joseph Suich
Director, Office of Investigations & Enforcement (OIE)
New York State Department of Public Service
3 Empire State Plaza, 17th Floor
Albany, NY 12223
+15184744497

Very Truly Yours,

A small, square, light-colored stamp containing a handwritten signature in dark ink. The signature appears to be 'JS' or similar initials.

By: J Suich
Director, OIE

CC:

John Rhodes, DPS Chief Executive Officer

Thomas Congdon, DPS Deputy Chair and Executive Deputy

Robert Rosenthal, DPS General Counsel

Kevin Wisely, DPS Director, OREP

John Sipos, DPS Deputy General Counsel

Larry Schimmel, NYSAG General Counsel