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Hon. Jaclyn A. Brilling
Acting Secretary
Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

December 24, 2003

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re: PSC Case No. 00-E-0612
Indian Point Two Outage Prudence Proceeding

Dear Secretary Brilling:

Enclosed herewith please find for filing with the Commission pursuant to the Procedural Ruling of Administrative Law Judge Jeffrey E. Stockholm issued in the above-captioned proceeding on December 10, 2003 the manually-signed original and five copies of the "Statement of Eliot Spitzer, Attorney General of the State of New York, Supporting Joint Proposed."

Please be advised that I am this day sending copies of this letter and the enclosed Statement to the parties to the above-captioned proceeding via first class U.S. mail.

Very truly yours,


RICHARD W. GOLDEN
Assistant Attorney General

cc: ALJ Stockholm
Parties

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

-----X
Proceeding on Motion of the Commission to
Investigate the Forced Outage at Consolidated :
Edison Company of New York, Inc.'s Indian :
Point No. 2 Nuclear Generating Facility. : Case No. 00-E-0612

Petition of Certain Members of the New York :
State Legislature Regarding Indian Point No. 2 Outage.
-----X

STATEMENT
OF
ELIOT SPITZER
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SUPPORTING JOINT PROPOSAL

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December 24, 2003

INTRODUCTION

On February 15, 2000, a cracked steam generator tube ruptured in the Indian Point 2 nuclear power plant ("IP2") and forced its operator, the Consolidated Edison Company of New York, Inc. ("Con Edison") to shut down the plant. IP2 did not resume operations until January 29, 2001, after the steam generators were replaced in their entirety.¹

On March 30, 2000, the New York State Public Service Commission ("PSC" or "Commission") instituted this proceeding to:

[E]xamine the causes of the outage, including events preceding the outage, and to ascertain whether Con Edison's steam generator inspection and maintenance practices were reasonable, whether the company's decision to postpone the replacement of the steam generators was prudent, and to determine whether and to what extent more expensive purchase power costs and repair and replacement costs should not be charged to ratepayers.²

In addition to the causes of the 2000-2001 outage, the Department of Public Service Staff ("DPS Staff") identified other alleged imprudent management practices by Con Edison which caused or extended three earlier prolonged IP2 outages: from January 25 to March 17, 1997; from October 14, 1997 to September 10, 1998; and from August 31 to October 18, 1999. Administrative Law Judge ("ALJ") Jeffrey E. Stockholm ordered that these three outages be considered and litigated together with the 2000-2001 outage.³ The New York State Attorney General ("AG") has been a party to this proceeding from the outset.

¹ On September 6, 2001, ownership of IP2 was transferred to Entergy Nuclear Indian Point 2, LLC, a subsidiary of the Entergy Corporation, a Louisiana-based generating business not affiliated with Con Edison.

² Case 00-E-0612, *Order Instituting Proceeding To Investigate Outage At The Indian Point No. 2 Nuclear Generating Facility*, p. 2. Public Service Law 66(12)(k) defines imprudence as "lack of reasonable care on the part of the utility in providing gas or electric service."

³ See ALJ Stockholm's March 15, 2001 *Procedural Ruling* recording his oral findings at a February 28, 2001 prehearing conference.

On December 4, 2000, the AG, by motion, raised a new damages issue concerning the 2000-2001 outage.⁴ The AG asserted that, “[t]he PSC should take into account the effect of the IP2 outage on the prices Con Edison paid for all power it purchased in the wholesale market, not just its cost to replace IP2’s output.”⁵ The AG argued that prices for wholesale electric power in the markets run by the New York Independent System Operator (“NYISO”) during the 2000-2001 outage were higher during peak weekday hours than they would have been if IP2 had been operating, because the absence of IP2’s approximately 1,000 MW of output affected the supply-demand price curve.⁶ On April 13, 2001, the ALJ granted the AG’s request “that the proceeding consider the increased cost Con Edison paid for the power it purchased other than replacement power.”⁷

On August 8, 2000, Chapter 190 of the Laws of 2000 was enacted prohibiting Con Edison from collecting from ratepayers the cost of replacing IP2’s power.⁸ Periodically, during

⁴ Case 00-E-0612, *supra*, Motion by New York State Attorney General Eliot Spitzer for Complete Quantification of Consolidated Edison’s Liability for Alleged Imprudent Management of its Indian Point 2 Nuclear Plant, p. 4, filed December 4, 2000.

⁵ *Ibid.*

⁶ *Ibid.* As New York’s wholesale power market commenced in November 1999, the market impact damages issue is not applicable to the outages that occurred before the 2000-2001 steam generator rupture incident.

⁷ Case 00-E-0612, *supra*, Procedural Ruling and Protective Order, issued April 13, 2001, pp. 8-9.

⁸ *An Act Prohibiting the Recovery of Costs in Connection with a Radiation Leak at the Indian Point 2 Nuclear Facility on February 15, 2000*, L. 2000, c. 190. The statute was challenged by Con Edison and ultimately struck down by the courts. See *Consolidated Edison Company of New York, Inc. v. George F. Pataki, et al.*, 117 F.Supp.2d 257 (N.D.N.Y. 2000), affirmed 292 F.3d 338 (2nd Cir., 2002), cert den. 537 U.S. 1045 (2002).

2000 to 2003, confidential negotiations were held with all parties pursuant to PSC Settlement Guidelines.⁹ Ultimately, these negotiations resulted in the Joint Proposal, which was signed by all parties to the negotiations and filed with the PSC on December 2, 2003.¹⁰

Pursuant to ALJ Stockholm's December 10, 2003 Procedural Ruling,¹¹ the AG files this statement in support of the Joint Proposal recommending its adoption by the PSC.

SUMMARY OF JOINT PROPOSAL

In settlement of all issues in this proceeding, including the AG's market impact damage issue, Con Edison agrees to refund a total of \$137.5 million to its customers.

Because Con Edison was prevented from collecting \$89,543,663 in replacement power costs during the 2000-2001 outage,¹² as part of the total settlement, Con Edison will forego collection of this sum. The balance of \$ 47,956,337 will be paid by Con Edison as follows:

\$45,456,337 will be refunded to current Con Edison ratepayers as bill credits in proportion to their individual usage levels; and \$2,500,000 will be paid by Con Edison into a

⁹ See 16 NYCRR § 3.9.

¹⁰ *Joint Proposal on the Indian Point 2 Prudence Proceeding*. The signatories are: Con Edison, DPS Staff, the AG, Assemblyman Richard L. Brodsky, NYS Consumer Protection Board, Public Utility Project of New York Inc., New York City, Westchester County, Local 1-2 Utility Workers of America AFL-CIO and the Owners' Committee on Electric Rates, Inc.

¹¹ Case 00-E-0612, *supra*, *Procedural Ruling*, issued December 10, 2003. Following a public hearing scheduled to be held on January 6, 2004, the PSC will consider whether the Joint Proposal is in the public interest so as to merit adoption. Case 00-E-0612, *supra*, *Notice of Evidentiary Hearing*, issued December 10, 2003.

¹² Con Edison was prevented from collecting the cost of replacing IP2's power for several months pursuant to a PSC Order Case 00-E-1343 implementing Chapter 190 of the Laws of 2000, which, as noted, was later struck down by the courts. *Commission Proceeding Implementing Chapter 190 of the Laws of 2000, Order Modifying Tariff And Mandating Refunds*, issued August 9, 2000.

fund to assist Con Edison's low income residential customers in improving the efficiency of their energy use.¹³

THE PSC SHOULD ADOPT THE JOINT PROPOSAL

The Commission's Settlement Guidelines specify that the scope of the proceeding to consider a proposed settlement "shall be limited to the issue of whether or not the proposed settlement is in the public interest" and sets out the following standards for review:

- a. A desirable settlement should strive for a balance among (1) protection of the ratepayers, (2) fairness to investors, and (3) the long term viability of the utility; should be consistent with sound environmental, social, and economic policies of the Agency and the State; and should produce results that were within the range of reasonable results that would likely have arisen from a Commission decision in a litigated proceeding.
- b. In judging a settlement, the Commission shall give weight to the fact that a settlement reflects the agreement by normally adversarial parties.¹⁴

As the Joint Proposal meets each element of these standards, the Commission should find that adoption of the Joint Proposal would be in the public interest.

¹³ This fund is to be administered by the New York State Energy Research and Development Agency ("NYSERDA"), with 88% of such funds to be used for New York City residents and 12% for Westchester County residents.

¹⁴ Cases 90-M-0255 - *Proceeding on Motion of the Commission Concerning its Procedures for Settlement and Stipulation Agreements*, filed in C 11175 and 92-M-0138 - *In the Matter of the Rules and Regulations of the Public Service Commission Contained in 16 NYCRR, Chapter 1, Rules of Procedure – Proposed Amendments to Subchapter A, General, Part 2, Hearings and Rehearings by the Addition of a New section 2.6, Settlement Procedures*, filed in C 11175, Opinion 92-2, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines, Appendix B, *Procedural Guidelines for Settlements*, pp. 7-8, issued March 24, 1992.

1. If This Proceeding Were Litigated, Con Edison Would Likely Be Found Imprudent With Respect To Each Of The Four Outages, But Such A Result Cannot Be Guaranteed.

The DPS Staff, AG and other parties have actively prepared for the litigation of this proceeding, including examining evidence relevant to the prudence of Con Edison's actions and management of IP2 during each of the four outage periods under review. The AG concludes that, were this case to be litigated, the PSC would find evidence sufficient to establish Con Edison's imprudence with respect to each of the four subject outages.

However, the outcome of a litigated proceeding cannot be guaranteed. The PSC's evaluation of the Joint Proposal must also consider the litigation risks that affect the range of likely outcomes both as to the question of Con Edison's imprudence during each of the four outages and the quantification of ratepayer reimbursement for each. For example, before any such damage amount is considered, the Commission must determine whether and to what degree the 2000-2001 outage was caused by Con Edison's imprudence. The portion of the entire outage for which Con Edison may be held liable is subject to considerable uncertainty and depends upon which of several alternative liability theories the PSC accepts. For example, the PSC might find that the utility's imprudence prior to the February 15, 2000 steam tube rupture is not adequately proven, but that the company's slow response to the incident, delay in deciding to replace the steam generators, and/or excessive time in restoring IP2 to normal operation do support a finding of liability for some period less than the entire 349-day outage.

Given the real uncertainties as to what the litigated outcome could be, ratepayers are best off receiving a settled amount now, rather than waiting out the delays of litigating the proceeding and any subsequent appellate review. In light of the uncertainty and length of a litigated

resolution, the Joint Proposal's \$137.5 million settlement amount strikes a reasonable balance of ratepayer and investor interests.

2. If Imprudence Were Established, Con Edison Would Likely Be Liable For The Impact IP2's Outage Had On Wholesale Market Prices, But Such A Result Cannot Be Guaranteed.

With respect to the 2000-2001 outage, Con Edison, if found to be imprudent, would be liable to repay to customers not only the cost of power it purchased to replace IP2's output, but also the increased cost of the power purchased from the wholesale market during the outage to meet its customers' needs and through bilateral contracts based on the market price.

By the time of the February 15, 2000 steam generator rupture, Con Edison had divested most of its non-nuclear generation and was purchasing much of its customers' required power from independent generators through the wholesale power markets maintained by the NYISO and market price-based bilateral supply contracts. In determining which generating units are dispatched to meet expected load during each hour, the NYISO day ahead market auction matches the total load requirements bid into the market with the power amounts offered into the market by all generators and selects the generators' bids in order from lowest to highest price consistent with physical dispatch requirements. The resulting highest generator bid selected to meet the total load for each hour establishes the hourly "market clearing price," the wholesale power price for all electricity sold in the market.

In the NYISO's wholesale power market, power prices can increase sharply during periods of peak demand, as the amount of power required to meet customer usage levels

approaches the limits of available supply. Since demand is relatively inflexible,¹⁵ the amount of available supply can have a big impact on the resulting price. Because IP2 is a baseload plant (meaning it would almost always be part of the available supply called upon), the absence of IP2's nearly 1,000 MW of output from the market had an impact on the market clearing prices during many periods of peak demand.¹⁶

In preparation for litigating this proceeding, the AG analyzed the NYISO market prices in Westchester County and New York City during the 2000-2001 IP2 outage. The estimated difference in price between what Con Edison would have paid for market-priced power if IP2 had been running and what it actually paid during the outage, multiplied by the number of megawatts Con Edison purchased during weekday peak hours from the wholesale market while IP2 was off line, results in an estimate of the outage's market impact on the price Con Edison paid for all its power needs.

This result would be affected by numerous variables, such that the outcome of a litigated proceeding on this issue cannot be guaranteed. For example, Con Edison would likely argue, and the Commission might find, that no damages are appropriate for the period of time that the

¹⁵ Most electricity users are unable to monitor the hourly price changes in the NYISO wholesale markets and are unable to reduce their demand in response to sudden peak price increases. Most of Con Edison's retail customers are billed a single rate for their monthly usage regardless of whether they use electricity during peak or off-peak hours.

¹⁶ An October 17, 2000 report by the NYISO's independent market advisor concluded that the absence of IP2's generation significantly increased the cost of power Con Edison paid for other electricity it purchased in the newly created wholesale market. Patton, David B., Ph.D., Capital Economics, *Preliminary Market Assessment of the New York Electric Markets*, presented October 17, 2000 to the NYISO Board and Management Committee.

utility was previously scheduled to shut down IP2 for refueling.¹⁷ The PSC's determination of how many days, if any, to allow for such refueling and during which months such allowance should apply would affect the amount of market impact damages. Similarly, the PSC's resolution of disputes over how many days' allowance, if any, should be granted for the time required to replace the steam generators, and during which months such allowance should apply, could alter the market damage amount.

While the AG is confident that the theory of the market impact damage claim rests on solid ground, defenses Con Edison would assert to the market impact damage claim would need to be weighed by the PSC. The result cannot be guaranteed, as the analysis has not been previously considered by the PSC. We conclude that the Joint Proposal represents a reasonable compromise of the estimated market impact damages.

3. The Proposed Settlement Payment Is Within The Range Of Reasonable Results Likely From A Litigated Proceeding.

Determination of the prudence issues and the market price impact damages, if litigated, would involve uncertain litigation risks. As noted above, there are a number of contested proof issues which affect the range of likely outcomes of the Commission's calculation of the total replacement power and the market price impact issue. Assuming that the Commission found Con Edison imprudent and thus liable for part or all of the 2000-2001 outage, there are additional uncertainties as to the litigation outcome of the market impact damage issue.

The AG has concluded that these litigation uncertainties justify the \$137.5 million figure reached by the parties, and that this figure is within the likely range of reasonable litigated

¹⁷ In Con Edison's 1999 rate proceeding, a 45-day refueling outage was forecast to commence April 12, 2000.

outcome results. Con Edison's ratepayers would benefit from receiving their proportional share of the settlement amount now, rather than awaiting the outcome of additional years of litigation. Con Edison's investors would benefit from the certainty and closure of this Joint Proposal.

4. Dedicating \$2.5 Million To Improve Energy Efficiency For Low Income Consumers Is In The Public Interest.

The Joint Proposal sets aside \$2.5 million of Con Edison's payment to be used by NYSERDA to assist Con Edison's low income customers to improve their energy efficiency. This is an appropriate result. Efficiency improvements can reduce low income customers' monthly electricity bills while also benefitting all customers by contributing to a clean environment and reducing total system demand. This efficiency set-aside is a sound investment that, over time, will magnify the benefit and value of Con Edison's settlement payment. Accordingly, this set-aside proposal is in the public interest.

5. Unanimous Support Of The Active Parties Demonstrates That The Joint Proposal Is In The Public Interest.

The parties who negotiated the settlement represent diverse and often adversarial interests and points of view, including ratepayer advocates, local governments, a state legislator, the union representing IP2 workers and a group of commercial customers, in addition to the DPS Staff and Con Edison. The varied interests of the parties who negotiated and agreed to the Joint Proposal ensures that the PSC will be addressing the diverse interests of multiple stakeholders in adopting the settlement. The fact that all parties to the negotiation have signed and support the Joint Proposal is further basis for the PSC to find that the \$137.5 million resolution of this proceeding as set forth in the Joint Proposal is both adequate and in the public interest.


CONCLUSION

The Joint Proposal satisfies the Settlement Guidelines and is in the public interest. For these reasons, the AG recommends that the PSC adopt the Joint Proposal.

Dated: New York, NY
December 24, 2003

Respectfully submitted,
Eliot Spitzer
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