STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 14, 1999

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

Case 96-E-0897 - In the Matter of Consolidated Edison Company of New York, Inc.'s Plans for (1) Electric Rate/Restructuring Pursuant to Opinion No. 96-12; and (2) the Formation of a Holding Company Pursuant to PSL Sections 70, 108 and 110, and Certain Related Transactions.

ORDER APPROVING TRANSFER OF GENERATING FACILITIES AND MAKING OTHER FINDINGS

(Issued and Effective July 28, 1999)

INTRODUCTION

By petition dated March 12, 1999, Consolidated Edison Company of New York, Inc. (Con Edison or the company) and Astoria Generating Company, L.P. (Astoria GenCo) jointly request authority to transfer Con Edison's Astoria Generating Station, Gowanus Gas Turbines, Narrows Gas Turbines and related assets (Astoria facilities) to Astoria GenCo for $550 million, subject to adjustments at closing. Astoria GenCo was the winning bidder for the third of the three bundles of assets auctioned by Con Edison.[1/] Astoria GenCo also requests that it be lightly regulated under the Public Service Law (PSL). Con Edison and Astoria GenCo assert that their PSL '70 and related filings are

[1/] The sales of the other two bundles of assets were approved in Case 96-E-0897, Consolidated Edison Company of New York, Inc. - Plans for Electric Rates and Restructuring, Order Approving Transfers of Generating Facilities and Making Other Findings (issued June 8, 1999); Case 96-E-0897, *supra*, Comprehensive Order Approving Transfers of Generating Facilities and Making Other Findings (issued June 17, 1999).

in accordance with various Commission opinions[1] and comply with the auction-related orders for Con Edison.[2]

After careful review of the PSL '70 petition and supporting documents, the comments received and Staff's analysis, the sale to Astoria GenCo is approved, subject to the conditions set forth herein. Con Edison's transition power purchase agreements with Astoria GenCo are accepted for filing and certain of the requested findings are made. Astoria GenCo will be subjected to lightened regulation under the Public Service Law once it becomes the owner of the Astoria facilities.

BACKGROUND

Under the Rate and Restructuring Plan adopted for Con Edison in Opinion No. 97-16, the company committed to develop a plan to divest all of its electric generating facilities, with the exception of the Indian Point No. 2 nuclear power plant and its associated gas turbines (Indian Point 2). In the plan, Con Edison proposed to sell at least 50 percent of its fossil-fueled electric generating facilities located in New York City (in-City generating facilities) to unaffiliated third parties.

The Auction Plan and Compliance Orders

On March 2, 1998, Con Edison filed a Generation Divestiture Plan and Petition (divestiture plan) to divest its in-City generating facilities. The company proposed to auction some of its in-City generating facilities to unaffiliated third

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[1] Cases 94-E-0952 et al., Competitive Opportunities Regarding Electric Service, Opinion No. 96-12 (issued May 20, 1996); Case 96-E-0897, supra, Opinion No. 97-16 (issued November 3, 1997).

[2] Case 96-E-0897, supra, Order Authorizing the Process for Auctioning of Generation Plant (issued July 21, 1998) (Auction Plan Order); Case 96-E-0897, supra, Order on Consolidated Edison Compliance Filing for Divestiture of Generating Facilities (issued August 5, 1998) (Auction Compliance Order).

parties and to transfer the remaining plants to an affiliated entity. We conditionally approved the divestiture plan in the Auction Plan Order but gave Con Edison an opportunity to propose a compensation scheme for agreeing not to have any of its affiliates participate in the auction. Thereafter, in the Auction Compliance Order, we approved, subject to conditions, Con Edison's proposal to divest all in-City generating facilities to unaffiliated third parties and to permit it to retain up to $50 million in net gains from its auction to reduce its unrecovered investment in Indian Point 2.

The Auction Plan Order outlined Con Edison's responsibilities in conducting and concluding the sale of its in-City generating facilities. The company was to conduct a two phase auction process. Phase I would include the solicitation of non-binding initial bids. In Phase II, selected bidders from Phase I would conduct further due diligence, propose revisions to the transaction contracts and submit binding bids. Thereafter, Con Edison, in consultation with its financial and legal advisors would select the winning bidders. If more than one of the Phase II bids clustered around a particular price, the clustered bidders would then be given a reasonable opportunity to distinguish their bid offers from the others.

In order to maximize the long term development of a competitive in-City generation market, the assets were divided into three, roughly equivalent bundles consisting of one generating station and one or more gas turbine sites. The choice of three bundles also provided the best opportunity for Con Edison to maximize value for the assets. The specific assets in each of the three bundles are as follows:

Bundle 1: Arthur Kill Generating Station, located in Staten Island, Richmond County, and 20 gas turbines located at the company's Astoria facility in Queens County

Bundle 2: Ravenswood Generating Station, located in Long Island City, Queens County, and 16 gas turbines also located at the Ravenswood facility

Bundle 3: Astoria Generating Station,[1] located in Queens County, 32 gas turbines located in the Gowanus section of Brooklyn, Kings County, and 16 gas turbines located in the Sunset Park section of Brooklyn, Kings County, all totaling 1,855 MW

Market power issues were of primary concern. Con Edison examined the effect of its divestiture plan on the installed capacity market, the energy market and the ancillary services market and determined that any new owner could potentially exert market power until sufficient new generation was constructed in the City or the transmission constraints in the City were eliminated. To address these concerns, on June 1, 1998, the company filed its localized market power mitigation measures applicable to these three markets. The proposed measures addressed the impact of transmission constraints and local reliability rules on the prices of those products and services. The measures were adopted in the Auction Plan Order.

Load pocket[2] market power is addressed through benchmarking spot market prices for in-City units against the Indian Point 2 bus price, with mitigation measures triggered whenever the spot price of the divested unit rises above 105 percent of the benchmark. The New York Independent System Operator (NYISO) is expected to integrate these mitigation measures into its procedures.

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[1] The Station consists of three steam-electric generating units and one gas turbine unit.

[2] A "load pocket" is a portion of a utility service territory in which load levels, at certain times, will exceed the transfer capability into the area, and so local generator(s) must serve some of the load. Depending on the specific circumstances present in a load pocket, the local generator(s) may or may not possess market power.

Local reliability rules were also addressed in the Auction Plan Order. Whenever those rules compel commitment of a divested unit, which would not otherwise have been committed under the NYISO's commitment and dispatch, the particular generator's start-up and minimum load bids would be replaced by its "Unit Commitment Reference Price." This price is determined through a calculation that reflects the unit's heat rate curve, fuel price index and a variable operational and maintenance adder.

To address market power concerns in the installed capacity market, Con Edison's proposal to cap the prices for divested generation at a "Capacity Reference Price," set at $105 per kW-year, was adopted. This cap remains in effect until such time as the Federal Energy Regulatory Commission (FERC) determines that it may be removed.

To ensure compliance with the local reliability rule providing that ten minute reserves must be carried by in-City units, Con Edison's two-part mitigation strategy was adopted. First, divested in-City units are required to provide availability bids of zero to the NYISO in all hours, and, second, they are required to make their spinning reserves available to the NYISO for dispatch.

Labor and environmental issues were also addressed in the Auction Plan Order. Con Edison planned to require the purchasers of the three bundles to honor all collective bargaining agreements and offer employment to non-union personnel working at all of the plants. Con Edison also required the purchasers to assume all past, present and future environmental liabilities. In order to provide adequate disclosure of potential environmental liabilities, Con Edison was ordered to assist bidders in the identification of environmental liabilities, thereby providing greater certainty for their due diligence efforts.

THE JOINT PETITION

In the joint petition, the petitioners describe the assets to be transferred, Astoria GenCo's ability to manage the Astoria facilities, the contracts that were executed between the parties, and the process that was actually undertaken to auction the facilities. The petitioners ask that we:

1. find the transfer is in the public interest pursuant to PSL '70;
2. approve the transaction contracts;
3. determine that the buyer is in compliance with the Commission's vertical and horizontal market power guidelines;
4. find that auctioned assets are "eligible facilities" pursuant to Section 32 of the Public Utility Holding Company Act (PUHCA), enabling each buyer to secure exempt wholesale generator (EWG) status from the FERC;
5. confirm that Astoria GenCo qualifies for lightened regulation as an electric corporation; and
6. approve the proposed accounting for the sale and transfer of the auctioned assets and proposed application of the proceeds from the sale.

The Purchaser

Astoria GenCo is a Delaware limited partnership formed for the purpose of purchasing and owning the Astoria facilities. Astoria GenCo is owned by Orion Power New York GP II, Inc. (1% ownership interest) and Orion Power New York LP II, Inc. (99% ownership interest). These two companies are subsidiaries of Orion Power Holdings, Inc. (Orion), a Delaware corporation. Orion is itself an indirect subsidiary of The Goldman Sachs Group, Inc. (formerly, The Goldman Sachs Group, L.P.)[1/] and the

[1/] Goldman Sachs' ownership of Orion is through GS Capital Partners II, L.P. and other related investment funds. In total, Goldman Sachs possesses a 63% ownership interest in Orion.

Constellation Energy Group, Inc.[1]

An affiliate of Astoria GenCo, COSI Astoria, Inc., will hire all employees and operate and maintain the Astoria facilities. CPS will provide power marketing and risk management services.

Conduct of the Auction

Con Edison asserts that it conducted the auction in conformance with the requirements of the Auction Plan Order. Morgan Stanley & Co., Inc. (Morgan Stanley) managed the auction process while preserving strict confidentiality concerning the bidders and their bids throughout the process.

Morgan Stanley began by soliciting expressions of interest from approximately 135 entities. A total of 47 entities then signed confidentiality agreements, enabling them to receive a confidential Offering Memorandum and all data and documents relating to the assets. Non-binding Phase I bids for the Astoria facilities were received November 3, 1998.

Thereafter, Morgan Stanley recommended the bidders that should be invited to participate in Phase II of the auction process for each bundle. Each Phase II bidder was given access to relevant documents via CD-ROMs and a data room at Con Edison's corporate offices. Each Phase II bidder was given detailed presentations by Con Edison management and extensive plant tours. During the Phase II process, responses to over 600 questions from bidders were distributed to all the bidders.

The Phase II bidders were provided with drafts of the transaction contracts and were given the opportunity to offer comments. After consideration of all comments, revised agreements were sent to all bidders. Bidders were then encouraged to submit final bids based on the terms and conditions

[1] Constellation Power Source, Inc. (CPS), a direct subsidiary of Constellation Energy Group, Inc., possesses the Constellation portion of the ownership interest (i.e., 37%) in Orion.

in the revised agreements. Final binding Phase II bids for the Astoria facilities were received February 26, 1999. After evaluation of these bids, Con Edison selected Astoria GenCo as the winning bidder. Final contracts were executed on March 2, 1999.

The Public Interest

Con Edison maintains the transfer of its Astoria facilities to Astoria GenCo is in the public interest. The company stresses that the sale of these plants to this purchaser will advance the transformation of the electric industry in New York State and effectuate our vision of a competitive market for electric service.

Con Edison affirms that it is has complied with the provisions outlined in the Auction Plan Order and the sale of the facilities is in the public interest because the transaction:

1. facilitates a robust competitive electric market;
2. will not undermine our jurisdiction over Con Edison's electric transmission and distribution functions;
3. maximizes the value of the assets;
4. involves a qualified purchaser;
5. conforms to our horizontal and vertical market power guidelines;
6. protects the interests of workers currently employed at the generating facilities; and
7. will not have any significant impacts on the environment.

The Transaction Contracts

Asset Purchase and Sales Agreement

Con Edison has entered into a number of transaction contracts with Astoria GenCo. The central agreement is the Asset Purchase and Sales Agreement (APSA). The APSA delineates all the conditions of the sale and the specific actions to be taken by the parties prior to and after closing. Specific areas of note are summarized below.

Environmental Liabilities - The APSA provides that Astoria GenCo will assume, with certain limited exceptions, all environmental liabilities arising from the ownership and operation of the facilities. The one exception is that Con Edison will continue to assume all environmental liabilities related to prior off-site disposal of hazardous substances.

Labor Provisions - Astoria GenCo will offer employment to all current plant employees, assume the terms and conditions of Con Edison's collective bargaining agreement until it expires, and maintain compensation and benefits to management employees for a period of three years.

Continuing Site and Declaration of Easements Agreements

Three separate Continuing Site Agreements were executed between Con Edison and Astoria GenCo, one for the Astoria Generating Station and one for each gas turbine site. These agreements allow Con Edison access to parts of the auctioned assets and allow Astoria GenCo access to certain assets retained by Con Edison. In addition, the easements necessary to enable the parties to access, operate and maintain the assets are included in the Declaration of Easements.

Transition Agreements

Con Edison has entered into a Transition Capacity Agreement (TCA) with Astoria GenCo that requires Astoria GenCo to maintain the capability and availability of the auctioned assets until the later of: (a) the earlier of December 31, 2002 or the date the NYISO provides notice that the capacity is not needed to meet in-City requirements; or (b) the end of the capability period preceding the period covered by the first auction for capacity sponsored by the NYISO. In addition, Con Edison will purchase the plants' total installed capacity at a prescribed maximum price at least for the 1999 summer capability period, and thereafter until a market for installed capacity is established by the NYISO. If the NYISO establishes a capacity market for the 1999-2000 winter capability period, Con Edison will purchase at least 454 MW from Astoria GenCo at the same price (additional purchases will occur if the closing occurs after July 31, 1999). Should Astoria GenCo fail to meet its obligations under the TCA, a formula is specified for determining the appropriate penalty to be paid to Con Edison.

Con Edison has also entered in a Transition Energy Sales Agreement (TESA) that gives Con Edison the right to purchase the energy generated from the Astoria facilities at cost-based rates from the day of closing of the sale until the NYISO is operational. If the NYISO is not operational by March 1, 2000, either party may request a renegotiation of the contract. If an agreement cannot be reached at that time, Astoria GenCo will file tariffs governing such purchases with the appropriate regulatory agency(ies), to be effective June 1, 2000.

Con Edison will procure and supply all fuel required by the facilities to generate energy for Con Edison. Astoria GenCo will reimburse Con Edison for fuel oil and will procure its own natural gas used to generate energy for sale to third parties.

Con Edison will pay Astoria GenCo an energy conversion payment of $1/MWh multiplied by the average net electrical output of each unit sold to Con Edison on an hourly basis. In addition, the TESA provides for penalty and incentive payments based on specified performance standards.

To ensure that Astoria GenCo operates the plants efficiently, a target BTU heat input has been included in the agreement. Astoria GenCo will pay Con Edison for all BTUs consumed in excess of 104 percent of the target and Con Edison shall pay Astoria GenCo for BTU consumption savings below 96 percent of the target.

The Auction Plan Order conditioned the closing on the sale of the auctioned assets on the NYISO being operational, unless we determine otherwise. Con Edison and Astoria GenCo request that we determine that, due to the existence of the TCA and TESA, the NYISO need not be operational in order for the closing to take place. Con Edison asserts that the TCA and TESA eliminate market power concerns and the need for monitoring mitigation measures that would otherwise be performed by the NYISO.

Guarantee and Equity Contribution Agreements

Orion has executed a guarantee in favor of Con Edison which secures the performance by Astoria GenCo under the APSA and other transaction agreements, including payment of the purchase price. In addition, Orion's parents have executed an equity contribution agreement guaranteeing specified cash payments to Con Edison under certain circumstances. The purpose of this agreement is solely to ensure Astoria GenCo will have the financial resources necessary to close the transaction. Therefore, this agreement terminates upon consummation of the closing.

Market Power

Con Edison's proposed market power mitigation measures governing the sale of capacity, energy and certain ancillary services from all in-City generating facilities were approved in the Auction Plan Order and were subsequently endorsed by the FERC on September 22, 1998. Astoria GenCo is obligated to abide by these price controls until such time as the FERC determines that they may be removed.

Price controls were found to be needed, at least for a transition period, due to the limited ability both to import power into the City, creating a City-wide load pocket, and to move it within the City, creating several smaller in-City load pockets. Since generation is needed within a load pocket for at least some of the hours in the year, any of the owners of the three bundles would have an ability to profitably raise prices above their costs at such times, successfully exercising market power.

The price controls are described in detail in the Auction Plan Order and are summarized as follows:

Energy:	Whenever the spread between the Locational Based Marginal Price (LBMP) at the Indian Point bus and an in-City bus is greater than 5 percent, the NYISO would substitute a cost based Energy Reference Price, if lower, for that unit's incremental energy bid.
Commitment:	When an in-City unit is committed out of merit order for local reliability needs, the NYISO would substitute a cost based Unit Commitment Reference Price, if lower, for that unit's start up and minimum load bids.
Capacity:	Installed capacity would be sold by the new owners through an auction and the price paid to them would be capped at $105 per kW-year.
Reserves:	These in-City units would be required to submit availability bids of zero to the NYISO and would make spinning reserves available only through the NYISO.

The joint petition contains an affidavit demonstrating that in all markets studied, the transfer of the Astoria facilities to Astoria GenCo poses no horizontal market power concerns in any relevant market. The affiant notes that the sales are, in fact, deconcentrating, as market shares decline when a large entity like Con Edison sells its assets to entities that do not have as large a presence in that same market. As a result, the Herfindahl-Hirschmann Indices (HHI) for all markets analyzed decline.

In reaching this conclusion, the affiant analyzed four geographic energy markets, Western New York, the City, Eastern New York and Long Island, and examined each market for six time periods. In addition, installed capacity shares on a statewide basis were studied using FERC's hub-and-spoke screen.

While the HHIs decline in the City energy market, the values are high and there are numerous load pockets. The same can be said for Long Island. The in-City capacity market had been found to be non-competitive in the Auction Plan Order, based on Con Edison's own showing, and the PSL '70 analysis supports that finding. The other markets analyzed not only show declines in HHIs, but the absolute values are within the range considered representative of a competitive market, that is, less than 1500.

Accounting and Taxes

The total purchase price for the Astoria facilities is $550 million. Estimated federal income tax amounts to $113 million. Con Edison estimates divestiture costs to be $8 million. Net proceeds are therefore estimated to be $97 million. Con Edison is considering a variety of alternative uses for the cash proceeds, including utility investment, common stock repurchase and other investments.

Con Edison will retain the first $50 million of after federal income tax gains realized from the divestiture of all its electric generating assets, as provided in Opinion No. 97-16. Additionally, pursuant to the Auction Compliance Order Con Edison may retain up to $50 million of after federal income tax gains, net of divestiture costs, to reduce Con Edison's unrecovered investment in Indian Point 2.

Further, Con Edison may apply 10 percent of the gross proceeds of the sale of all generating assets to offset its strandable non-utility generator (NUG) costs. Con Edison proposes that net after-tax gains on the sale of all generating assets, net of amounts retained, be deferred and included in the final calculation of stranded costs. The stranded costs would be collected in rates after March 31, 2002 over various time periods, as specified in Opinion No. 97-16. Con Edison proposes to apply interest at the unadjusted customer deposit rate to the deferrals beginning on the first day of the rate year following the closing of each sale.

Exempt Wholesale Generator Status

Con Edison and Astoria GenCo interpret federal law as requiring that a state agency find new ownership of a generation facility will benefit customers, is in the public interest and does not violate state law, before the FERC will accord Astoria GenCo EWG status on the generation facilities they will purchase. Astoria GenCo seeks EWG status so that it may operate the facilities free of burdensome federal regulation intended for monopoly utilities.

Astoria GenCo asserts that it will participate in a wholesale competitive market for the sale of electricity. Since competition in the marketplace will set the price the generators may charge, consumers will benefit and state rate regulation is not necessary. The EWG findings have been made in similar circumstances in other states,[1/] for the purchasers of Con Edison's Asset Bundles 1 and 2,[2/] and for Astoria GenCo's affiliate, Erie Boulevard Hydropower, L.P., which purchased Niagara Mohawk Power Corporation's hydroelectric generating facilities.[3/]

Light Regulation and Financing Approvals

Astoria GenCo requests that the Commission confirm that it and its affiliates qualify for lightened regulation as New York electric corporations. According to Astoria GenCo, it resembles other wholesale generators that have been afforded that form of regulation. Astoria GenCo notes that its financing is part of a global financing that has already been approved.[4/] It asserts that no further approvals are necessary.

PARTY COMMENTS

Notice of the petition was published in the State

[1/] See Docket No. 96-11-020, Pacific Gas and Electric Corporation, Interim Opinion (Cal. P.U.C., December 16, 1997), p. 5.

[2/] Case 96-E-0897, supra, Order Approving Transfers of Generating Facilities and Making Other Findings (issued June 8, 1999).

[3/] Cases 94-E-0098 and 94-E-0099, Niagara Mohawk Power Corporation - PowerChoice Rate and Restructuring Plan, Order Approving Transfer of Hydroelectric Generation Facilities and Making Other Findings (issued May 27, 1999).

[4/] Case 99-E-0839, Erie Boulevard HydroPower, L.P. - Petition for Approval of Issuance of Debt, Order Authorizing Issuance of Corporate Debt (issued June 28, 1999).

Register on March 31, 1999. A meeting among Con Edison, Staff and interested parties was held at the Commission's New York City offices to discuss the petition on April 16, 1999. Thereafter, on April 22, 1999, the Commission issued a Notice Soliciting Comments, with comments due May 7, 1999. Comments were received from the New York State Consumer Protection Board (CPB); the New York State Attorney General (Attorney General); City of New York (City); Local 1-2, Utility Workers of America (Local 1-2); Owners' Committee on Electric Rates (OCER); New York Energy Buyers Forum (NYEBF); and Coordinated Housing Services, Inc. and the 1st Rochdale Cooperative Group, Ltd. (1st Rochdale). On May 24, 1999, Con Edison submitted reply comments.

A summary of the party comments was included in the Comprehensive Order regarding the transfer of Asset Bundle 1 to affiliates of NRG Energy, Inc (NRG) and Asset Bundle 2 to MarketSpan Corporation d/b/a KeySpan Energy (KeySpan). It is reproduced here as Appendix A.

DISCUSSION

Con Edison conducted the auction in substantial conformance with the Auction Plan Order. The auction process which led to the sale of the Astoria facilities to Astoria GenCo was designed to maximize the sale price. The $550 million purchase price was the highest of the bids received.

Astoria GenCo is an entity with the requisite financial and operational backing, and, in conjunction with its affiliates, will be capable of owning, operating and maintaining the Astoria facilities in a competitive environment. Moreover, Astoria GenCo meets the tests for determining that, as a new entrant into the wholesale electric marketplace, it will not be able to exercise horizontal or vertical market power. As a result, the transfer of the Astoria facilities to Astoria GenCo is in the public interest and is approved.

Compliance With Prior Orders

Con Edison has satisfactorily demonstrated that it implemented its divestiture plan in substantial conformance with the prior Orders. Participation in the auction was solicited from a broad range of potential bidders. All qualified bidders that executed the confidentiality agreement were invited to submit indicative bids in Phase I. The Phase I bidders were provided with the confidential offering memorandum that contained information on the Astoria facilities, term sheets for the various transaction agreements, and other detailed information.

After reviewing indicative bids, Morgan Stanley narrowed the field to a manageable number of Phase II bidders. Environmental assessments of the facilities and appurtenant property were conducted in order to ensure bidders were adequately informed of potential environmental liabilities. Meeting the schedule described in the Auction Plan Order, final bids for Bundle 3 were submitted by the Phase II bidders on February 26, 1999. Because of the requirements imposed on bidders, negotiations with Astoria GenCo at the conclusion of the auction were limited and very few changes were made to the APSA. Con Edison periodically informed Staff of its progress during the course of the auction.

Market Power

Horizontal Market Power

There are three ways to define the geographic market for the Astoria facilities' generating capacity. At one extreme, the market can be defined very broadly to include the entire Northeast, including Ontario and Quebec. A second definition is New York State as a whole. Finally, at the other extreme, the market for the Astoria facilities' sales can be defined to be solely New York City.

In their market power analysis, the petitioners define the market to be the entire Northeast. This includes all 37,000 MW of capacity in New York State, plus 150,000 MW of capacity in the Hydro Quebec, Ontario Hydro, New England, and Pennsylvania-

Jersey-Maryland (PJM) power pools. In analyzing the market share of Astoria GenCo and its affiliates, the petitioners include 6,410 MW of capacity owned by Orion in the PJM Pool. Using this market definition, the petitioners' market power analysis obtains an Astoria GenCo (including all of its affiliates) market share of 4.7 percent. This is a small market share, well within the acceptable range. Such a broadly defined geographic market, however, fails to account for the fact that transmission constraints limit the importation of capacity into New York to about 10 percent of New York's needs. Thus, a smaller geographic market definition is needed.

If the market is defined as all of New York State, plus a 10 percent import capability, Astoria GenCo's percentage of installed capacity available to New York State is about 6.6 percent, which is still small enough to minimize concerns.

Moreover, as was discussed in detail in the Comprehensive Order, New York City is its own capacity market separated, in large part, from the rest of New York State. The New York installed capacity market is driven by the statewide 18 percent reserve margin. In contrast, the in-City capacity market is driven by Con Edison's local reliability rule that requires each Load Serving Entity (LSE) to have contracts with the owners of in-City installed capacity covering 80 percent of the in-City load served by that LSE. The in-City market is very tight with no excess capacity. Therefore, Astoria GenCo would not be able to profitably use its ownership of an in-City bundle to increase out-of-City market prices nor use its ownership of out-of-City capacity to increase in-City capacity prices.

First, Astoria GenCo is subject to penalties for failing to supply all 1,855 MW of installed capacity in-City. These penalties will eliminate a substantial portion of any profit Astoria GenCo could otherwise gain. Second, if Astoria GenCo withholds its in-City capacity to tighten the State market, it would not be able to exercise market power with its 765 MW of upstate capacity (some of which cannot operate at all times during the year due to lack of water or water use restrictions). Third, because the in-City market is independent of the State market, Astoria GenCo's withholding of any part of its out-of-City capacity would not affect the in-City price received for the capacity from the Astoria facilities.

Over the long term, even if the price cap is removed and both the State market and in-City market were in balance, the two markets should remain independent. A price premium, albeit a smaller one, should continue to be paid in-City that reflects the higher cost of building either generation or transmission to meet the needs in the in-City market. A withholding strategy in-City to boost prices elsewhere is unlikely to be profitable nor would an out-of-City withholding strategy have an impact on the already higher prices in-City. Therefore, no additional horizontal market power mitigation measures, beyond those already in place, are necessary.

Vertical Market Power

Astoria GenCo and its affiliates do not own any electric transmission or distribution facilities in New York State. Therefore, there are no vertical market power concerns associated with the transfer of the Astoria facilities to Astoria GenCo.

The Transaction Agreements

Con Edison has entered into a number of contracts with Astoria GenCo, as described above. The terms and conditions of the APSA, Continuing Site, Declaration of Easements, Guarantee and Equity Contribution Agreements are reasonable and they are approved. The TCA and TESA are accepted for filing under PSL '110(4).

Con Edison negotiated the APSA and associated transaction agreements in conformance with the Auction Plan Order. They properly capture the real property and generation assets that will be transferred to Astoria GenCo. Appropriate reservations for electric substations, disconnect switches, and other electrical interface equipment are reflected. The contracts also contain environmental and labor provisions, requiring Astoria GenCo to assume all environmental liabilities associated with the Astoria facilities, with the exception that Con Edison retains environmental liabilities related to prior off-site disposal of hazardous substances.

Astoria GenCo is contractually bound to offer jobs to all union and non-union employees at all three generation sites. The collective bargaining agreement is continued for union employees, while non-union employees will receive total compensation and benefits at least comparable to those Con Edison is providing. By letter dated June 23, 1999, Local 1-2 notified Staff that all union concerns had been resolved and the union was withdrawing its request that consideration of the joint petition be deferred.

The Transition Agreements

Nothing in the TCA or the TESA undermines the conclusion that the transfer is in the public interest. The TCA provides for the sale of all the installed capacity to Con Edison for a reasonable period of time. The installed capacity price is set at the $105 per kW-year bid and price cap amount in Con Edison's capacity market power mitigation measures. Con Edison's obligation to purchase at least 454 MW from Astoria GenCo for the 1999-2000 winter capability period, even if there is a NYISO capacity auction, allows Con Edison to satisfy its commitment to obtain in-City capacity for energy service companies (ESCOs) for this period.

The ratemaking mechanisms in place do not contemplate recovery of any additional capacity costs above those subsumed in the Rate and Restructuring Plan. In its divestiture plan, Con Edison indicated its intent to propose modifications to its fuel adjustment clause to reflect the difference between market costs and the embedded costs reflected in rates. NYEBF, however, argues that Con Edison should not recover any such increased costs resulting from the TCA.

The Rate and Restructuring Plan adopted for Con Edison contemplated the company's filing of a modified FAC within 180 days of the NYISO assuming control of energy dispatch within the State.[1] Because the auctions and sales proceeded relatively quickly, while implementation of the NYISO has been delayed, the time for submitting proposed modifications to the FAC may be reasonably adjusted.

In the case of the TESA, the existing FAC mechanism provides a means of recovering the costs of these purchases from all customers. The FAC permits recovery of all economy energy purchases, defined in the tariff as "energy purchased in compliance with economy energy definition of the New York Power Pool plus that energy purchased at a total charge equal to or less than the company's avoided fuel cost."[2] Although this definition did not anticipate Con Edison's divestiture of many of its generating units, it is reasonable to conclude that TESA purchases qualify under the FAC as economy energy.

TESA purchases are being made at cost, plus or minus an availability incentive, and will be made only in economic order subject to reliability needs. For the time being, however, Con Edison should exclude the $1/MWh energy conversion payment which has already been reflected in base rates for these units. As with all charges passed through the FAC, the TESA purchases remain subject to our review for prudence.

The Auction Plan Order conditioned closing the transactions upon the operation of the NYISO. The joint petitioners request a waiver of this requirement, which they assert is appropriate because of the existence of the transition agreements and market power mitigation measures. We agree and

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[1] Case 96-E-0897, supra, Order Adopting Terms of Settlement Subject to Conditions and Understandings (issued September 23, 1997) (Rate Plan Short Order), Appendix A, p. 32.

[2] See Con Edison Tariff, PSC No. 9-Electric, Leaf No. 162.

therefore specifically waive ordering paragraph 6 of the Auction Plan Order providing that final approval of the transfer be contingent on the NYISO being operational.

Reliability and Safety

In the Transaction Agreements, Con Edison has preserved its authority to operate the transmission system and respond to system emergencies. The APSA and associated agreements ensure that reliability will be preserved during the transfer of ownership, and provide for a continuing relationship between Con Edison and Astoria GenCo that is structured to preserve reliability in the future. Furthermore, the contracts compel Astoria GenCo to conform to good utility practice, which includes conformance to all applicable requirements of the Public Service Law, our rules and regulations, New York Power Pool (NYPP), Northeast Power Coordinating Council, North American Electric Reliability Council and New York State Reliability Council, requirements, and reliably operate the Astoria facilities on the date it assumes ownership.

The TESA grants Con Edison the right to commit, schedule and dispatch any and all of the facilities as it deems necessary. This includes requiring that the units be available for economic dispatch for purposes of providing ancillary services to the NYPP or NYISO. Con Edison also may rely on the units to provide voltage support, load following, regulation, reserves, and other similar ancillary services. The TESA also includes an incentive/penalty mechanism to encourage availability. The mechanism is in effect during the peak hours of Monday through Friday, 9 a.m. to 7 p.m. In addition, if load pocket conditions arise within the Astoria load pocket, the penalty provisions apply during weekends and holidays. Further, the penalty/incentive mechanism applies continually from 6 p.m. on December 31, 1999 through 10 a.m. on Monday, January 3, 2000. to address Year 2000 computer concerns.

Under the contracts, compliance with safety provisions of state and federal law is mandated. Because Astoria GenCo will be an electric corporation under New York law, it must continue to meet all applicable safety requirements including those in 16 NYCRR Part 125.

Year 2000 Readiness

Con Edison has taken reasonable steps to confront Year 2000 computer programming issues outside the context of the transaction contracts. In conformance with our Year 2000 Orders,[1] Con Edison filed its contingency plan on June 30, 1999. The generating facilities at issue herein are subject to these Orders and are now reported to be Year 2000 ready.

Astoria GenCo has agreed to adopt Con Edison's plan, as it relates to the Astoria facilities. To ensure that the Year 2000 concerns associated with these plants continue to be adequately addressed, we direct Astoria GenCo to fully prepare for and, if necessary, implement the pertinent terms of the contingency plan.

The Public Interest

Under PSL '70, our consent is required before an electric corporation may transfer any of its assets to a new owner. The consent is furnished if the transfer is in the public interest. In making this determination, a review is conducted of the details of the transaction, the qualifications of the purchaser to provide the utility service, the impact of the transaction on rates and other salient details.

This transfer is in the public interest. Astoria GenCo has demonstrated that it has adequate financial backing, that its affiliate, COSI Astoria, Inc., has extensive experience in operating power plants of many types and is already participating in competitive electric markets elsewhere in the world. Moreover, it has affirmed that it will operate the plants in a responsible and cost-effective manner. As a result, Astoria GenCo and its affiliates possess the management skills and

[1] Case 98-M-1432, Utility Year 2000 Readiness, Order (issued October 30, 1998); Case 98-M-1432, supra, Order (issued February 17, 1999).

financial backing needed to close the purchase, maintain the facilities, and operate them efficiently and reliably.

Moreover, the price paid is satisfactory. Since the auction was conducted in conformance with the Auction Plan Order, the resulting price was determined by participants in an open and fair market. As discussed in that Order, the price that a free market generates is presumably reasonable.

None of the other details of the transaction countermand the conclusion that it is in the public interest. The divestiture of Con Edison's facilities via auction benefits ratepayers, contributes to the creation of a fully-functional wholesale market for electricity where the ability of any of the participants to exert market power has been adequately mitigated, and brings companies with a record of responsible plant operation into the in-City market. Accordingly, the transfer is approved.

Auction Proceeds and Accounting

Astoria GenCo will pay Con Edison $550,000,000 for the Astoria facilities. In addition to the generating facilities, the assets to be purchased include associated electric transmission facilities, real property, supplies and materials, spare parts and ancillary equipment.

Con Edison expects to derive net gains after taxes of approximately $96,988,000 for the Astoria facilities.[1/] To calculate these figures, Con Edison subtracted the net book cost at December 31, 1998 from the sales price, and further reduced the proceeds by applicable state revenue taxes and allocated costs of the sale. The net book gain is then reduced by federal income tax payable and increased by unused regulatory deferred federal income tax, at 35%, related to accelerated depreciation.

Con Edison has incurred divestiture-related costs,

[1/] The actual net gain on the sale will be determined by unrecovered book costs at the date of closing, actual divestiture-related costs and actual taxes payable in connection with the sale.

including legal, financial, engineering, environmental, surveying, advertising and other services, but has only provided an estimate of their total in the joint petition. These costs will be updated when the final calculation of gain is made. Since the company is unable to ascertain total employee-related costs, such as separation payments, until the closing has occurred, those figures require review as well.

Astoria GenCo has agreed to pay Con Edison the book cost of supplies and materials and spare parts inventories at closing. It will also be responsible for transfer, sales and other taxes. In addition, Astoria GenCo will pay Con Edison the book cost of any fuel oil inventories as of the termination date of the TESA.

Section II.13(v) of the Rate and Restructuring Plan permits the company to retain the first $50 million of after-tax gain on the sale of these bundles.[1/] Pursuant to the Auction Compliance Order, Con Edison may also retain $50 million, net of divestiture costs, to reduce its unrecovered investment in Indian Point 2. As to the balance of the gain, interest on this deferred gain will accrue at the unadjusted customer deposit rate beginning in the first rate year after the closing of the sale. One tenth of the company's share of the gross proceeds from the sale of each bundle is to be considered an offset to NUG costs at risk for disallowance.

As a result, the auction costs, adjustments to the purchase price, the calculation of the various incentives, and other cost and tax issues shall be reviewed after the closing of the sales of all three in-City asset bundles and Con Edison's interest in the Bowline Point Generating Station (Bowline). As the closings of Asset Bundles 1 and 2 and Bowline have already occurred, and in conformance with the requirements of the Orders approving the sales of Asset Bundles 1 and 2, Con Edison is directed to file its final costs and proceeds figures for the

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[1/] Rate Plan Short Order, Appendix A.

sale of all of the above-mentioned generating facilities within 60 days of the closing of this transaction.

As noted in the prior Orders, parties have proposed myriad uses for the anticipated net proceeds from the auctions. The discussion and directives in our prior Orders on this issue continue to apply and the collaborative proceeding described therein shall commence upon the receipt of Con Edison's filing.

Analysis of Comments

CPB, Attorney General, and the City request that we begin an inquiry into the utilization of the anticipated net proceeds of the asset sales. We concur with this request. Once the filing described in the preceding section is made, a collaborative process shall be commenced to address whether the benefit of the net proceeds of the auctions should be received by ratepayers sooner than the end of the current rate-restructuring plan period, and if so, how they should be used. During this process, proposals concerning the pace and timing of ratepayer recovery, possible adjustments to the retail access plan on behalf of ratepayers and other reasonable options may be raised. We will not, however, revisit the basic allocation of costs and benefits between ratepayers and shareholders set forth in Opinion No. 97-16, the Auction Plan Order and the Auction Compliance Order.

In regards to increasing the shopping credit, there should be no subsidization of the retail access program by full service customers. However, parties are not precluded from making their case on what the credit should be. The shopping credit for Phase III of retail access, to begin May 1, 2000, will be developed in the near future with all parties able to voice their opinion. Parties will not be precluded from making a case for using some of the benefits of the divestiture to increase the shopping credit.

The City's discussion regarding the sale of Asset Bundle 2 to KeySpan is addressed in the prior Orders and is not repeated here. As to the City's request that the Con Edison's retail access program schedule be revised, this proposal should be considered as part of the collaborative proceeding.

OCER comments on continued regulation of in-City generation until the market becomes more diversified are addressed by the fact that the FERC has rejected the sunset clause that was part of Con Edison's market power mitigation proposal. Therefore, the cap on prices for divested generation will not end until the FERC determines such.

NYEBF's request that the approval of the transition capacity agreements be conditioned on Con Edison not being permitted to recover any costs resulting from these agreements during the term of the settlement agreement or thereafter is rejected. As noted above, these contracts are not being approved and the recovery of any such costs incurred by Con Edison are not now being requested. We will determined the extent, if any, of any recovery if and when Con Edison makes such a request.

State Environmental Quality Review Act Compliance

Pursuant to the State Environmental Quality Review Act (SEQRA), approval of the joint petition is a subsequent action to the actions addressed in the Final Generic Environmental Impact Statement (FGEIS) issued in conjunction with Case 94-E-0952 and in Environmental Assessment Forms (EAFs) evaluating Con Edison's rate and restructuring and divestiture plans.

We assumed lead agency status pursuant to SEQRA and its implementing regulations (6 NYCRR Part 617 and 16 NYCRR Part 7). Based on the EAFs, we determined that authorization of Con Edison's divestiture plan would be carried out in conformance with the conditions and thresholds of the FGEIS and with the findings issued in Opinion No. 96-12.

The present action will not, in and of itself, directly lead to anything more than a change in ownership of the Astoria facilities. The generating facilities to be transferred will continue to operate in accordance with existing environmental permits which will not change as a result of the sales. The plants are now, and will continue operating within limits imposed by Federal, State and local environmental laws, and regulations. Permits are unaffected by the transfer of ownership. Any new construction, addition or repair would be subjected to appropriate environmental reviews.

On the basis of the FGEIS, the prior EAFs and the EAFs included with the joint petitions, we find that the approval of the asset transfer is a subsequent action to Case 94-E-0952 and will be carried out in conformance with the conditions and thresholds of the FGEIS and with the findings issued in Opinion No. 96-12. Therefore, no further SEQRA action is necessary.

Federal and State Regulation

EWG Status

Con Edison and Astoria GenCo ask that findings be made sufficient to justify a FERC decision that the Astoria facilities may be awarded EWG status under federal law. Operating under that rubric, say the companies, will avoid unnecessary federal regulation and will permit more efficient participation in the wholesale electric market.

Accordingly, in conformance with PUHCA and FERC's regulations,[1/] we find that allowing the Astoria facilities to become eligible facilities, with Astoria GenCo owning the plants directly or indirectly through one or more affiliates as defined under federal law:[2/] 1) will benefit New York consumers; 2) is in the public interest; and, 3) does not violate New York law.

Light Regulation

In the Carr Street and AES Orders,[3/] it was decided

[1/] 15 U.S.C.A. '79z-5a; 18 C.F.R. '365.

[2/] 15 U.S.C.A. '79b(a)(11); 18 C.F.R. '365.3(a)(1)(i).

[3/] Case 99-E-0148, AES Eastern Energy, L.P. and AES Creative Resources, L.P. - Petition on Regulation, Order Providing For Lightened Regulation (issued April 23, 1999); Case 98-E-that a realistic appraisal was needed to ascertain the Public Service Law requirements that should be imposed on new forms of electric service providers that differ from traditional electric utility monopoly providers. After conducting that appraisal, it was determined wholesale generators should be regulated lightly. Because Astoria GenCo is also a wholesale generator, it will be treated as the Carr Street and AES Orders provide.

Thus, and as discussed in detail in those Orders, Astoria GenCo is exempt from the provisions of PSL Article 1, 2, 4, and 6 that adhere, by their terms, to the retail sale of electricity. However, Astoria GenCo is not exempt from the remainder of PSL Article 1 and ''69, 69-a and 70 of PSL Article 4. Those provisions prevent producers of electricity from taking actions that are contrary to the public interest, whether they are monopoly utilities or otherwise. Moreover, application of those provisions to wholesale generators remains necessary in light of obstacles to entry into the generation market.

In recognition of the competitive nature of the generation market, though, the provisions can be implemented with scrutiny reduced to the level the public interest requires. In addition, wholesale generators may fulfill their reporting requirements by duplicating the reports they are required to file under federal law.

Regarding PSL '70, it was presumed in the AES Order that regulation would not adhere to the transfer of ownership interests in entities upstream from the wholesale generator's parents, unless there is a potential for harm to the interests of captive utility ratepayers. That presumption is continued for Astoria GenCo, but it is advised that the potential for the exercise of market power arising out of an upstream transfer will be sufficient to defeat the presumption and trigger PSL '70

1670, Carr Street Generating Station, L.P. - Petition On Regulation, Order Providing For Lightened Regulation (issued April 23, 1999).

review.

As with other wholesale generators, most of the provisions of PSL Article 6 need not be imposed on Astoria GenCo. These provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates charged by monopoly providers. So long as the wholesale generation market is effectively competitive, wholesale generators cannot raise prices if their costs rise due to poor management. Moreover, imposing these requirements could interfere with wholesale generators' plans for structuring the financing and ownership of their facilities. As a result, Astoria GenCo are not required to seek pre-approval for its arrangements under PSL ''110(3) and (4), because those sections will not be applied to it.

Astoria GenCo's power marketing arrangements with CPS raise potential market power issues, because either company could acquire market power through this affiliation. As discussed in the Carr Street Order, these issues may be addressed under PSL ''110(1) and (2), which afford jurisdiction over affiliated interests. In the unlikely event such issues arise, PSL '110(1), on reporting of stock ownership, and PSL '110(2), on access to books and records and the filing of reports, pertain to Astoria GenCo and its affiliates. They are required to submit for review such books, records, and reports as Staff from time to time may need for the purpose of resolving potential market power concerns.

Astoria GenCo and its affiliates are also reminded that they remains subject to Public Service Law jurisdiction with respect to matters such as enforcement, investigation, safety, reliability and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed above.

Financing Arrangements

Astoria GenCo will finance its purchase through debt arrangements made for the purpose of funding this transaction and transactions engaged in by other Orion affiliates. These debt arrangements, in the amount of $700 million in acquisition facility debt and $30 million in working capital facility debt, have already been approved.[1] As a result, the only issue remaining on the financing for this purchase is authorization for Astoria GenCo to participate in the previously approved debt arrangements. Such authorization is granted upon the terms and conditions of our prior approval.

The Commission orders:

1. Consolidated Edison Company of New York, Inc.'s sale of its Astoria Generating Station, Gowanus Gas Turbines, Narrows Gas Turbines and related assets to Astoria Generating Company, L.P. is approved, subject to the conditions discussed in the body of this Order.

2. The Asset Purchase and Sales Agreement, Continuing Site Agreement and Declaration of Easements Agreement Consolidated Edison Company of New York, Inc. entered into with Astoria Generating Company, L.P. are approved, subject to the discussion in the body of this Order.

3. The Transition Capacity and Energy Agreements Consolidated Edison Company of New York, Inc. entered into with Astoria Generating Company, L.P. are accepted for filing.

4. Astoria Generating Company, L.P. shall continue to ensure the Astoria facilities are Year 2000 ready and shall implement Consolidated Edison Company of New York, Inc.'s Year 2000 contingency plan, as it relates to the Astoria facilities.

5. Consolidated Edison Company of New York, Inc. shall make a filing setting forth the amount of proceeds it receives, the costs it incurred in conducting the auctions of its electric generating facilities (including the sale of the Bowline

[1] Case 99-E-0839, supra, Order Authorizing Issuance of Corporate Debt (issued June 28, 1999).

Point Generating Station) and the company's proposed accounting and ratemaking treatment for the net proceeds, in conformance with the discussion in the body of this Order, within 60 days of the closing of this transaction.

6. Upon receipt of the filing described above, a collaborative process shall be commenced to examine issues concerning the allocation of net proceeds for the benefit of ratepayers, as discussed in the body of this Order.

7. Ordering paragraph 6 of the Auction Plan Order is waived; the closing may occur prior to the New York Independent System Operator becoming operational.

8. The findings on exempt wholesale generator status under the Public Utility Holding Company Act described in the body of this Order are made.

9. Astoria Generating Company, L.P. shall make the filings required of other wholesale generators subject to lightened regulation under the Public Service Law, as described in the body of this Order.

10. Astoria Generating Company, L.P. shall comply with the Public Service Law to the same extent as other wholesale generators subject to lightened regulation under the Public Service Law, as referenced in the body of this Order.

11. Astoria Generating Company, L.P. is authorized to participate in the issuance of the $700 million acquisition facility debt and the $30 million working capital facility debt, for an aggregate amount of no more than $730 million, upon the terms and conditions described in the body of this Order.

12. This proceeding is continued

By the Commission,

(SIGNED)

DEBRA RENNER
Acting Secretary

APPENDIX A

SUMMARY OF PARTY COMMENTS

Consumer Protection Board

CPB asks that a proceeding be initiated, to begin 60 days after the completion of the sale of the asset bundles, to reconsider the treatment of the gains from the sales. In support of its request, CPB refers to a statement in the Rate and Restructuring Plan (the Plan) providing that the rate and revenue benefits reflected therein "are subject to being increased" if, among other things, there are "net gains available from sales of generating plants."[1/] CPB also notes that Opinion No. 97-16 specifically refers to the possibility that additional savings might be available during the terms of the Plan from, among other things, "sales of generating plants."[2/]

Perceiving that the net gain from the sale of the three asset bundles will approximate $300 million, CPB believes negotiations should be commenced among all stakeholders, to consider various options for equitable sharing of the net gain on a more timely basis. Under CPB's proposal, we would review any negotiated agreement among the parties and determine if it produces just and reasonable rates and is in the public interest. If the parties fail to reach agreement, CPB says we should determine the manner in which the net gains should be allocated among the parties.

Under one potential interpretation of the Plan, CPB believes, Con Edison could retain a ratepayer net gain of $300 million, without accruing any interest for the benefit of ratepayers, until April 1, 2000. CPB also believes that after April 1, 2000, and until April 1, 2002, the company could retain the $300 million as additional cash flow while accruing interest for the benefit of ratepayers at the customer deposit rate. According to CPB, these benefits, along with benefits resulting from the merger with Orange and Rockland Utilities, Inc., provide significant savings which were not fully anticipated at the time

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[1/] Rate Plan Short Order, Appendix A., p. 7.

[2/] Opinion No. 97-16 at 26.

the Plan was adopted.

The New York State Attorney General

Like CPB, the Attorney General asks that an inquiry be conducted into the utilization of the anticipated net proceeds of the asset sales for the benefit of Con Edison's residential and small business customers. According to the Attorney General, Con Edison's residential and small business electric customers should receive the largest feasible rate decrease as early as possible, prior to the end of the Plan on March 31, 2002.

The City of New York

The City maintains approval of the sale will better serve the public interest under PSL '70 if the divestiture produces benefits for City consumers before the end of the Plan. It contends the outcome of divestiture demonstrates Con Edison's stranded cost liability is substantially less than the amount the utility predicted. The City asserts Con Edison's customers consequently should benefit from the sales. The City asks that Con Edison be directed to make a filing within 60 days of the closing date of the last sale that includes:

1. a final calculation of the net divestiture gains;

2. an explanation why the rate decreases under the Plan should not be accelerated, and why further rate decreases should not be awarded given the net divestiture gains;

3. a proposal for increasing the retail shopping credit to a competitive level;

4. a proposal for full retail access by April 1, 2000; and

5. a plan for mitigating Con Edison's above-market contracts with NUGs which includes a discussion why an auction for NUG contracts should not begin by a date certain.

In support of its recommendations, the City reiterates

CPB's citations to the terms and conditions of the Plan. It also insists the estimate of stranded cost liability has fallen to $3.1 billion, from the $4.7 to $6.2 billion estimated earlier. The City contends further that New Jersey and Connecticut have adopted restructuring legislation providing for significant rate cuts and retail access well before March 31, 2002, and that the New York metropolitan area is in intense competition with both States.

According to the City, Con Edison already benefits significantly from the auction. The utility, the City explains, keeps the first $50 million of the net after-tax gains; uses another $50 million of the net gains to reduce the unrecovered investment in Indian Point No. 2; does not apply interest to the ratepayers' share of the net gain amount until April 1, 2000, with only the customer deposit rate of approximately 5 percent applicable between then and the end of the Plan; and, the gains from the divestiture are excluded from the calculation of return on equity. The City contends that Con Edison's ratepayers should not have to wait almost three years to obtain any benefits from the favorable auction outcome.

The City also recommends that the sale of Ravenswood facilities to KeySpan be conditioned upon mitigation of vertical market power concerns. KeySpan, says the City, should be required to concede our jurisdiction to order it to divest Ravenswood if KeySpan or any of its affiliates commit violations of a code of competitive conduct.

Local 1-2

Local 1-2 commented on pension benefits, service quality and public safety. After filing its comments, Local 1-2 engaged in successful negotiations with Con Edison, NRG, and KeySpan, and thereupon withdrew its objections.

Owners' Committee on Electric Rates

OCER urges modification of the Plan to permit use of the proceeds of the sales prior to April 1, 2002, for the purpose of reinvigorating the retail access program. OCER reports that its experience in the retail market in Con Edison's service territory suggests further evaluation of the environment for the development of a robust retail market is needed. According to OCER, the retail market for electricity suffers from the perception that the current program cannot deliver savings.

OCER is also concerned about market power. It argues that regulation of in-City generation should be continued until the time ownership becomes more diversified.

New York Energy Buyers Forum

NYEBF also desires prompt proceedings on the use of the net after-tax gains to benefit electric consumers. NYEBP contends further that Con Edison should not be permitted to recover any costs resulting from the Transition Capacity Agreements. According to NYEBF, Con Edison negotiated prices in the Agreements with full knowledge of the Plan's rate reductions and rate caps, and the utility should be required to keep its costs in line with the Plan's rates.

Coordinated Housing Services, Inc. and 1st Rochdale Cooperative Group, Ltd

1st Rochdale comments on the use of the benefits from the divestiture, the accounting used to determine net benefits and the treatment of federal income taxes and deferred tax benefits. 1st Rochdale also recommends renewed proceedings similar to those other commentors advocate.

1st Rochdale supports its recommendation in part by noting that Con Edison proposes a waiver of the condition that the NYISO commence operations before the transfer is completed. In return for the waiver, 1st Rochdale asks for accelerated disposition of the net proceeds for the benefit of ratepayers.

1st Rochdale also claims that Con Edison has understated the net proceeds from the sale and asks for review of Con Edison's proposed accounting.

1st Rochdale complains that Con Edison reports its federal income taxes at the straight statutory tax rate of 35 percent, as if the utility were not a subsidiary of a consolidated holding company. According to 1st Rochdale, the effective consolidated tax rate should be applied. It also asks for a review of the utility's calculation of the deferred tax benefits available to offset any federal income taxes that may be due.

Con Edison's Reply

Con Edison begins its reply by urging expeditious '70 approval for the transfer of the auctioned assets. The utility opposes immediate flow through to customers of some or all of the net divestiture gains. It cannot find a basis for modifying either the timing or manner for disposition of net gains or losses resulting from divestiture that are defined in the Plan. The utility stresses that it is still in the process of divesting its generating facilities, and that the Plan assures it a reasonable opportunity to recover its nuclear, NUG and other stranded costs remaining at March 31, 2002. Consequently, says the utility, it is premature to determine the net gains or losses at this time.

In support of its position, Con Edison cites the Auction Compliance Order for the proposition that the manner in which the net divestiture proceeds would be applied for the benefit of ratepayers would be determined at the expiration of the Plan. Upon rehearing of that Order, Con Edison continues, 1st Rochdale's suggestion that the disposition of divestiture gains would be an open issue during the '70 approval process was rejected.[1/]

[1/] Case 96-E-0897, supra, Order Denying Petition for Rehearing

In response to the City's assertion that it should be ordered to provide full retail access by April 1, Con Edison declares that it has a successful track record with the gradual and orderly phase-in of its retail access program to date. Furthermore, utilities, ESCOs, gas marketers and customers are still learning about the details of the retail access program.

Contradicting the arguments that the retail shopping credit must be increased, Con Edison argues that full service customers should not subsidize the retail access program. Con Edison disputes the City's perception of a disparity between its shopping credits and those in New Jersey and Pennsylvania, contending there is little difference between the shopping credits.

Con Edison does not accept 1st Rochdale's claim that an effective consolidated tax rate other than the corporate tax rate of 35 percent should be used. The utility finds the proposal meaningless, because the statutory tax rate for the holding company is also 35 percent. The utility also asserts its calculations already accord ratepayers full credit for the appropriate deferred taxes.

OCER's request to continue regulation of in-City generation in order to alleviate any market power concerns should be denied, says Con Edison, because it would inhibit the development of a competitive market and would undo the auctions, which were premised on "light regulation" of the winning bidders under the Public Service Law. Finally, mitigation of its above-market NUG contracts, says Con Edison, is currently under analysis, and it will report on the feasibility of divesting its NUG contracts once the NYISO begins operation.

(issued December 2, 1998).