STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of an Investigation into Consolidated Edison Company of New York, Inc.'s July 2019 Manhattan Customer Service Outages	:	**Case 20-E-0588**
In the Matter of an Investigation into Consolidated Edison Company of New York, Inc.'s July 2019 Southeast Brooklyn Customer Service Outages	:	**Case 20-E-0587**

RESPONSE OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. TO ORDER TO SHOW CAUSE

December 21, 2020

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RESPONSE OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. TO ORDER TO SHOW CAUSE

Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company") hereby responds to the Public Service Commission's ("Commission's") November 19, 2020 order[1] directing Con Edison to explain why the Commission should not commence a review of the prudency of the Company's actions with respect to the July 13, 2019 outage on the Westside of Manhattan (the "Manhattan Outage") and the July 21, 2019 outage in the Flatbush section of Brooklyn (the "Brooklyn Outage"), and pursue civil penalties pursuant to PSL § 25 and/or administrative penalties pursuant to PSL § 25-a and the Company's Outage Notification Incentive Mechanism ("ONIM").[2] The Commission also directed the Company to show cause

[1] Case 20-E-0588 – In the Matter of an Investigation into Consolidated Edison Company of New York, Inc.'s July 2019 Manhattan Customer Service Outages; and Case 20-E-0587 - In the Matter of an Investigation into Consolidated Edison Company of New York, Inc.'s July 2019 Southeast Brooklyn Customer Service Outages, Order Instituting Proceeding ("Order").

[2] Case 00-M-0095, Petition of Consolidated Edison, Inc. and Northeast Utilities for Approval of a Certificate of Merger, *Order Approving Outage Notification Incentive Mechanism*, Attachment A, April 23, 2002 ("ONIM Order").

why it should not adopt and implement the recommendations proposed by the Department of Public Service Staff in its November 19, 2020 Report ("Report").[3]

To begin with, the Order fails to state a basis for Commission action based on its factual allegations or on legal arguments. With respect to prudence, the Court of Appeals has previously explained that "[a] utility's decision is prudent if it acted reasonably based on the information that it had and the circumstances that existed at the time,"[4] not whether it could have adopted a different course of action. As shown below, the Company's actions related to the Manhattan and Brooklyn Outages were reasonable and prudent based on the facts known at the time.

Just as neither the facts nor the law support a prudence investigation, they similarly do not support the commencement of a proceeding for $24.8 million in penalties under Section 25-a of the Public Service Law for alleged violations of the Company's communication requirements in its approved electric emergency response plan ("ERP")[5] at the time of the event. Section 25-a of the Public Service Law authorizes the Commission to assess a penalty only when a utility fails to "reasonably comply" with the Public Service Law or an order or regulation adopted thereunder.[6] The reasonable compliance standard requires utilities to be "reasonably diligent … in attempting to accomplish what was ordered,"[7] for example, by having a plan that "reasonably

[3] Order at 4. *See also* New York State Department of Public Service Investigation Report on Con Edison's July 2019 Outages in Manhattan and Brooklyn. Con Edison is responding to these recommendations in a separate filing.

[4] *In the Matter of National Fuel Gas Distribution Corporation v. Public Service Commission*, 16 N.Y.3d 360, 368 (March 29, 2011) ("*National Fuel*").

[5] Order at 17-25.

[6] Public Service Law § 25-a.

[7] *Aspira of New York, Inc. v. Board of Education*, 423 F.Supp. 647, 654 (S.D.N.Y.1976).

assures" compliance with its ERP.[8] The Order ignores the reasonable compliance standard and attempts to replace it with a strict liability standard that has no basis in law and tolerates no departure, however reasonable, from the Department of Public Service's ("Department") after-the-fact view of events. As later sections of this response demonstrate, Con Edison met and exceeded the standard of a reasonably diligent response with respect to each penalty allegation.

The reasonable compliance standard was an essential part of the legislature's decision to grant the Commission penalty authority and yet the Order does not even acknowledge it as the standard. Instead, the Order creates a new standard that has no basis in the law where any purported Con Edison deviation from the Department's belief about how even an ambiguous ERP provision should be interpreted becomes the basis for a penalty. This is important here because the legislature recognized that utilities are highly regulated, provide critical public services, and have an obligation to serve all customers, regardless of the circumstances. The Order cannot eliminate this standard and write a new one. Its attempt to do so threatens the stability of New York utility regulation.

The Order fails to pay heed to reasonable compliance standard results in its alleging penalty violations related to communications during fast-moving dynamic situations.[9] The Company had no warning at all of the Manhattan outage, and with respect to the Brooklyn outage, the Company's decision to implement de-energization of the 4 kV grid, occurred after an

[8] *See, e.g., Application of Cassadaga Wind LLC for A Certificate of Envtl. Compatibility & Pub. Need Pursuant to Article 10 to Construct A Wind Energy Project, Located in the Towns of Charlotte, Cherry Creek, Stockton & Arkwright, Chautauqua Cty.*, No. 14-F-0490, 2019 WL 2552014, at *4 (June 14, 2019) ("The Certificate Holder's final [Invasive Species Control Plan or "ISCP"] addresses the control measures that will be used for construction, materials, inspection and sanitation, invasive species treatment and removal, and site restoration. The final ISCP includes a baseline species survey as well as the foundation for the required invasive species management plan set forth in the Certificate Order. Accordingly, the Commission finds that the final ISCP reasonably assures compliance with Certificate Condition 34 of the Certificate Order.").

[9] With respect to the Manhattan Outage, as soon as the Company was aware of the cause of the outage, Con Edison issued a public statement on July 29, 2019 explaining the reason for the outage.

unexpectedly rapid succession of feeder outages. The Order's allegations rely on strained interpretations of ambiguous ERP communication sections to allege violations that simply did not occur.[10]

Even if the Commission finds some items that may justify the commencement of a penalty or a prudence proceeding to determine if a remedy is appropriate, it should still exercise its discretion and refrain from commencing proceedings because the Company has already paid $5 million for Manhattan and $10 million for Brooklyn in negative revenue adjustments based on the Company's rate plan reliability performance mechanism that requires the Company to incur these charges even if it is not at fault.

Accordingly, for the reasons set forth herein, the Commission should not commence a penalty or prudence action and it should terminate this proceeding. Finally, as further explained herein, the Commission should find that Con Edison more than fully complied with its ONIM by proactively complying.

I. BACKGROUND

A. The Manhattan Outage

On Saturday evening, July 13, 2019, approximately 73,000 Con Edison customers[11] on the West Side of Manhattan[12] lost electric service. The Company restored electric service to all

[10] Moreover, the Order's allegations that the Company committed several ONIM violations are also incorrect. Indeed, each of the Order's alleged violations were not actually violations as the Order read requirements and obligations into the ONIM where none existed. As discussed herein, the Company complied with all ONIM requirements, thereby satisfying its legal obligations.

[11] Customer refers to a metered (billed) customer. The Company recognizes that many more people were impacted that night than what the Company tracks as metered customers.

[12] The affected area stretched from West 31st Street to West 71st Street, from the Hudson River to 5th Avenue at its farthest point East.

customers on the West Side in an average of three hours and 10 minutes.[13]

The Manhattan outage event started at 6:47 p.m. when a 13 kV distribution Feeder experienced an electrical fault in a manhole near the West 65th Street Substation. By design, the feeder's relays at both ends operated to isolate the feeder, thus limiting the impact of the fault to just the distribution feeder. The protective relays on the faulted feeder were uniquely designed such that the time to isolate the feeder fault (measured in tenths of a second) allowed the protective relays on Transformers 1, 2 and 4 (specifically, the ground differential or 87N relays) at the West 65th Street No. 1 Substation to simultaneously operate in response to the fault on this distribution feeder. These transformer relays de-energized six of the ten radial 138 kV transmission feeders supplying power from the West 49th Street Transmission Substation to the West Side of Manhattan.[14] The resulting abnormal loading conditions caused two additional 138 kV radial transmission feeders to de-energize shortly thereafter. The six networks affected by the de-energization were the Lincoln Square, Hudson, Columbus Circle, Plaza, Rockefeller Center, and Pennsylvania networks.

The Company quickly mobilized and began restoration efforts such that all affected customers were back in service by 11:37 p.m. on Saturday July 13. Indeed, the Company restored service to customers in three of the affected networks in under three hours and restored

[13]As a result of this outage, the Company incurred a $5 million negative revenue adjustment.

[14] A relay is an electric switch that is used to automatically open and close one circuit's contacts with another circuit in response to system conditions in order to protect system components. As discussed in the Company's response to DPS-11(1), the ground differential ("87N") relays are used to detect ground faults in transformers. With respect to the specific 87N relays at issue, when an 87N relay operates at the West 65th Street No. 1 Substation, it trips the isolation devices to de-energize the faulted transformer. To isolate the high-side of the transformer, the 87N relay will operate the auto-ground switch connected to the associated supply feeder. That switch operation will be detected by relays at the West 49th Street Substation to open the associated 345 kV circuit breakers. To isolate the low-side of the transformer, the 87N relay will open the transformer secondary breaker.

service to the other three affected networks in under five hours.[15]

The Company's post-event investigation determined that the underlying cause was the lack of a connection of a neutral wire between the transformer breaker current transformer ("CT") and the neutral auxiliary CT for the three 87N relays. As soon as the Company was aware of the cause of the Manhattan Outage, Con Edison issued a public statement on July 29, 2019 explaining the reason for the outage.[16] This flaw occurred approximately 10 years prior to the event as part of a breaker retrofit project for several circuit breakers at the West 65th Street No. 1 Substation. When a vendor performed the breaker upgrade work in late 2008 and early 2009, the vendor did not make the neutral wire connection. Con Edison believes this occurred due to an ambiguity that existed between the vendor's drawing and the Company's drawing. Once the Company discovered this fact during its investigation of the West Side Outage Event, the Company immediately and properly installed the neutral wires to meet the intended design. In addition, and out of an abundance of caution, the Company took the initiative to isolate and test 87N relays across the system.[17]

B. <u>The Brooklyn Outage</u>

On Sunday, July 21, 2019, during a significant summer heatwave, the electric system that serves the Flatbush network in Southeast Brooklyn experienced a series of events that affected the network's reliability. At 4:48 p.m., a 27 kV feeder failure interrupted service to

[15] No injuries were reported to the Company as a result of this event.

[16] Additionally, on October 2, 2019, the Company submitted its *Report on the West Side Outage Event Restoration, Company Investigation, and Recommendations* to Commission Staff. This report provided a detailed description of the reasons for the outage, how the Company quickly and efficiently restored service, and the post-event steps the Company has been taking to rectify the situation with its 87N relays.

[17] The Company has also absorbed all the O&M costs (approximately $1.3 million) associated with isolating and testing these relays and is now in the process of checking and restoring them. The Company has consulted with Department Staff during this process and has benefitted from the technical discussions and insight offered by Staff.

approximately 3,400 Cropsey Loop customers and, in conjunction with earlier events, put the Flatbush network in a third contingency status, which is one more than its second contingency design at peak demand. Over the next two hours, operators worked to restore feeders and were able to maintain the system with limited effects on customers by using established measures that included voltage reduction, transformer cooling, and targeted de-energization. After a fourth contingency, as the Company was making significant progress on restoring two components, the situation rapidly approached a cascade when a fifth and sixth 27 kV feeder came out of service at 7:06 p.m. and 7:11 p.m., respectively. These outages further stressed components within the network's 4 kV grid (which is supplied by the network's primary 27 kV feeders).

The total number of customers in the Flatbush network is approximately 130,000 and the 4 kV grid contained within the network has approximately 30,000 customers. As noted in the Report, at 7:32 p.m., operators exercised the only remaining option to prevent prolonged network-wide outages and significant damage to system equipment: they de-energized the Flatbush 4 kV grid and its 30,000 customers.[18]

The pre-emptive interruption affected customers who would have very likely experienced outages had operators not acted, protected the Flatbush network from significant damage and prolonged outages, and kept power flowing to approximately 100,000 other Flatbush network customers. The Report does not question the Company's decision to de-energize the 4 kV grid.

Moreover, the operators' decision to de-energize the 4 kV grid when they did made it possible to restore service more quickly than would otherwise have been possible. By 11 p.m.,

[18] Customers experienced service interruptions when operators de-energized stepdown transformers (approximately 1,900), select 4 kV feeders (approximately 2,200), and then ultimately the 4 kV grid, which totaled approximately 30,000 and included the 4,100 customers fed by stepdown transformers and select 4 kV feeders.

about three and a half hours after de-energizing the 4 kV grid, the Company had restored service to more than 11,000 customers, including those served by the Cropsey Loop. The next day, the Company restored service to an additional 17,000 customers. The Company restored service to all 4 kV grid customers by 3:00 a.m. on July 23, 2019.

C. The Order and the Report

On November 19, 2020, the PSC issued the Order with respect to the 2019 Manhattan and Brooklyn Outages. The Order directs the Company to show cause for each of the two outages why the PSC "should not commence a review of the prudency of its actions and/or omissions prior to, during, and after the Manhattan and Brooklyn outages, and pursue civil penalties…"[19] The Order also directs the Company to respond to the staff recommendations resulting from the outages, which are contained in the accompanying Staff Report.[20]

II. RESPONSE TO THE SHOW CAUSE ORDER

The Commission should dismiss the Order's allegations and terminate this proceeding. First, the Commission should refrain from commencing a prudence action. The Court of Appeals has explained that "[a] utility's decision is prudent if it acted reasonably based on the information that it had and the circumstances that existed at the time,"[21] not whether it could have adopted a different course of action. Moreover, the long-standing Commission standard is that prudence "is determined by judging whether [a] utility acted reasonably, under the circumstances at the time, considering that the company had to solve its problems prospectively

[19] Order at 4.

[20] *Id*.

[21] *National Fuel*, 16 N.Y.3d at 368.

rather than in reliance on hindsight."[22]

Second, Section 25-a of the Public Service Law authorizes the Commission to assess a penalty only when a utility fails to "reasonably comply" with the Public Service Law or an order or regulation adopted thereunder.[23] As explained herein, Con Edison reasonably complied with its Electric ERP during both the Manhattan and Brooklyn outages.[24]

Nevertheless, the Commission should not commence a penalty or a prudence proceeding because, under its rate plan in effect at the time of the outages, the Company has already paid $5 million for Manhattan and $10 million for Brooklyn in negative revenue adjustments based on the rate plan's reliability performance mechanisms. While the Commission has the authority to commence a penalty or a prudence proceeding, even where the Company has already incurred a negative revenue adjustment, the Commission should exercise its discretion and decline to initiate such proceedings here. As shown herein, the facts associated with Staff's interpretation of ambiguous ERP requirements, constitute reasonable compliance that do not justify a penalty or prudence action, especially given the magnitude of costs that the Company has already incurred.

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[22] *In the Matter of Long Island Lighting Co. v. Pub. Serv. Comm'n of the State of N.Y.,* 134 A.D.2d 143-144, 523 N.Y.S.2d 615, 620 (3d Dep't 1987) (internal quotation marks and citation removed).

[23] Public Service Law § 25-a (3), (5).

[24] The Commission can commence two types of penalty actions under the Public Service Law. Under section 25-a, the Commission can commence an administrative penalty proceeding and assess penalties for failure to "reasonably comply" with the Public Service Law or an order or regulation adopted thereunder. Under section 25, the Commission can commence a case in New York State Supreme Court and pursue a civil penalty if a utility "knowingly" violates the Public Service Law or an order or regulation adopted thereunder. As explained in this response, nothing in the Order or the Report justifies the Commission commencing a penalty action under the "reasonably comply" standard of section 25-a, let alone the "knowingly" standard of section 25. Therefore, for the reasons stated in this response, Con Edison asserts that the Commission cannot make a finding, based on the preponderance of the evidence, under either standard. For similar reasons, there is no basis for a prudence proceeding, regardless of whether the decision constitutes a violation of a Commission requirement.

A. There is No Basis for a Prudence Proceeding Related to the Manhattan Outage

1. The Order Incorrectly Alleges Imprudence for a Single Inadvertent Employee Error

The Order questions the prudence of the Company's actions with respect to the reconnection of the three 87N relays as part of the Company's breaker retrofit project,[25] the Company's inability to identify the flaw in the vendor drawings,[26] and the Company's inability to detect and correct the connection of the neutral wires in 2013.[27] As such, the Order alleges that Con Edison made three errors and should be found imprudent for these alleged errors. As will be explained herein, there was only one inadvertent error, *i.e.*, a Con Edison employee's failure to identify an error in a contractor's drawing that resulted in the failure to properly reconnect a relay during a breaker retrofit. The Commission should reject the Order's attempt to convert one error into three errors merely because the Company's prudent and reasonable testing and monitoring procedures failed to catch this single, unique, and non-transparent error after it occurred.

New York State Courts have held that a utility's actions and decisions are "prudent if it acted reasonably based on the information that it had and the circumstances that existed at the time,"[28] not whether it could have adopted a different course of action. As such, "hindsight is irrelevant to a prudence analysis because the utility must make a determination that addresses its

[25] Order at 12, 28-29. *See also* Report at 1, 5, 6.

[26] Order at 12, 28-29.

[27] *Id.*

[28] *National Fuel*, 16 N.Y.3d at 368.

business prospectively."[29] The Commission "cannot overturn a prudent decision by a utility because it believes that another course of action would have been preferable."[30] As shown below, looking at Con Edison's actions from the vantage point of when they occurred, it is clear that the Company's actions were reasonable at that time and that prudence is not an issue.

In this case, there was one inadvertent employee error and the Company had reasonable testing and monitoring procedures in place that could not have found this single, unique, non-transparent error from a vendor's performance of circuit breaker upgrade work. Here, as was the customary process at that time, the vendor created a separate wiring diagram for the protective relay circuits that focused only on those portions of the circuits being affected by the retrofit work. This separate diagram essentially took an excerpt of the overall transformer relaying circuit schematic and modified it to show connections to the upgraded breaker cabinet. This separate diagram lacked detailed terminal designations for the neutral-to-ground connection, thus one wire landed on a termination where two were required. The specific inadvertent error was that a Company employee who approved the vendor's drawing -- which was attached to the Company's drawing that showed the correct connection for the neutral wires -- failed to notice the terminal designations of the neutral wire connections in the vendor's drawing. The vendor, when performing the work, followed its drawing and not the Company's drawing.

The Commission has previously held that a utility should not have otherwise prudent costs disallowed due to an inadvertent employee mistake. In its opinion on the prudence of certain O&M costs related to the Ginna nuclear power plant owned by Rochester Gas & Electric ("RG&E"), the Commission first noted that in prudence cases, "we focused our attention on the

[29] *Id.*

[30] *Id.*

actions of management when making prudence determinations..."[31] But, in *RG&E*, the Commission stated that it was departing from its standard of refraining from converting an employee's mistake into a prudence disallowance for the utility because the "erroneous responses or clear mistakes of a utility's employees might, *in certain circumstances*, lead to a finding of imprudence." (emphasis added).[32] The clear mistake and certain circumstance in the *RG&E* case was that "RG&E's employee improperly acted by either leaving behind or dropping a 3.51 pound piece of metal inside the steam generator."[33] As a result the Commission imputed the imprudence of one employee to RG&E.[34] In so ruling, the Commission explained that its "prudence standard has always been what a reasonable person would do in the circumstances presented, without the benefit of hindsight; and such a person simply would not leave a *large chunk* of metal inside a nuclear steam generator" (emphasis added).[35] It is the rather obvious nature of this particular mistake and where the mistake occurred that explains the Commission's departure from its standard. Indeed, the Commission stated that its finding in *RG&E* "does not mean we have changed our standard here, in finding the company imprudent on account of the actions of its employees."[36]

Several parties appealed the Commission's decision to find certain of RG&E's costs prudent while finding that other costs were imprudent. In upholding the Commission's decision,

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[31] Case 28166 - *Proceeding on Motion of the Commission to Investigate the Outage of Rochester Gas and Electric Corporation's Ginna Nuclear Plant ("RG&E")*, 25 N.Y.P.S.C. 865, 1985 WL 258219 (N.Y.P.S.C.), *3 (1985).

[32] *Id.* at *3.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

the court recognized the unique severity of the employee error[37] and recognized the Commission's standard of *not* imputing the mistake of one employee to the Company to create an imprudence claim.[38]

In contrast to *RG&E,* the cause of the Manhattan Outage was a single inadvertent employee error that resulted in a vendor not making a proper connection. And that connection was contained in a bundle of wires that were hidden by arc-proof taping. Thus, the Commission should look to the legal standard expounded in *RG&E* and *Abrams* while recognizing that the error in this case was unquestionably not of the same magnitude and clarity as it was in the *RG&E* case.

2. Con Edison Had Processes and Procedures in Place to Test the Work That was Done and Monitor Whether There was an Installation Error

Both the Order and Report mistakenly assume that the Company had an opportunity to detect and correct the missing neutral wires as part of its breaker retrofit work in 2008 and 2013.[39] This is incorrect and thus, a ruling on the prudence of the Company's actions should determine only whether a proceeding is justified due to the one single inadvertent error that occurred in 2008 when a Company employee approved the drawings, including the vendor drawing with the error that the vendor relied on. As discussed herein, such a ruling should find that a prudence hearing is not justified.

To begin with, when the contractor reconnected the three 87N relays in 2008 and 2009 as part of the Company's breaker retrofit program, the reconnection was done pursuant to the

[37] *Abrams v. Public Service Commission of The State Of New York, et al*, 136 A.D.2d 187, 188 (1988).

[38] *See Abrams,* 136 A.D.2d at 189; and *RG&E* at *3.

[39] Order at 12, 29.

Company's rigorous processes and procedures governing the installation and testing of equipment. Company procedures require that all commissioning requirements be reviewed and approved by the Company's Protective Systems Testing ("PST") department.[40] At the same time, this department also reviews the settings and creates a test plan for any new or modified protective systems. In this case, a PST Supervisor would have been required to test the breakers that were being installed as part of the breaker retrofit project. Specifically, the work that the Company was performing in 2008 and 2013 that the Order and Report refers to was the Company's breaker retrofit program.[41] As such, the 87N relays were not part of the equipment that was being retrofitted and tested.

While it is true, as the Order and Report note, that one Con Edison employee noticed the that the neutral wire was not connected as required by design when reviewing the work done for a similar 2013 job, this does not provide the basis for instituting a prudence proceeding. Here, the Order incorrectly alleges that "the Company failed to act in 2013 when the discrepancy between the technical drawings was noticed by the work crew."[42] The work crew did not notice the drawing discrepancy. Instead, one employee found that the neutral wire was not connected as required, which was outside of the scope of that crew's work which was to determine if the breaker retrofit had been installed correctly. Once it was discovered that a wire was not connected as required, the Company notified the vendor who had installed the breaker and the vendor came to the Company's facility and reconnected the neutral wire. Because one employee went beyond what was required by Company procedures and discovered a flaw does not permit

[40] The personnel who inspect this type of work were required to undergo years of training.

[41] The Company's breaker retrofit program has the Company replacing 60 breakers per year.

[42] Order at 29.

an allegation that all Con Edison employees should have noticed this flaw or that the Company should have assumed that this flaw had occurred other times on its system. Indeed, even though Con Edison informed the highly experienced vendor about the mistake and had the vendor correct the wiring, the vendor did not inform Con Edison that this is how it had been reconnecting the relays. In other words, it is only with 20-20 hindsight that the original error appears obvious.

Hindsight, however, is irrelevant to a prudence analysis because the Company cannot be judged on whether a better method of testing existed in the future.[43] The Commission has previously said that "we consider the prudence of particular actions to depend on the facts and circumstances present when the decisions were made."[44] That the Company's execution of its well-considered procedures proved imperfect in hindsight does not render them imprudent or unreasonable, and the Order does not demonstrate or even allege otherwise.

3. The Neutral Wire That Was Not Connected As Required By Design Was Obscured Over Ten Years Because It Was Hidden and Related to Unique Distribution Feeders

The three relays in question functioned and did not operate for over ten years until July 2019. These 87N relays exist to provide coverage for a rare type of fault, *i.e.*, their sensitivity is such that other relays will operate before they do thus obviating their need to operate in most circumstances. As such, they did not need to operate during the intervening 10-year period. Thus, there was no monitoring equipment evidence available to the Company prior to the 2019 event that the relays were not connected as required by design. Accordingly, during the intervening years between when the three 87N relays were installed and July 13, 2019, these

[43] *National Fuel*, 16 N.Y.3d at 368.

[44] Case 27794 – *Rochester Gas & Electric Company*, Opinion 81-1, 1981 WL 721569, *444 (1981).

three relays did not reveal any issues. As such, there was no reason to suspect that these relays had a flaw. When reviewing Con Edison's monitoring of these three relays over the intervening 10 year period, the Company's performance must be judged "based on the information [Con Edison] had and the circumstances that existed at the time."[45] The information that Con Edison had during these intervening years was that the three relays were functioning properly.

This makes sense when considering these particular 87N relays in context. 87N relays are intended to protect transformers by detecting ground faults, even low-level ground faults, within transformers that may not be detected by other relays. The wiring inputs to an 87N relay are arranged so that the relay only reacts to faults within the transformer and ignores all other faults. In 2008 and 2009, when the neutral wires on three 87N relays were disconnected and not reconnected upon completion of that work, these relays were left in a state where they were susceptible to react to faults external to their associated transformers, and even external to the substation itself. They were still able to achieve their primary purpose of detecting faults within transformers, but they were no longer able to ignore external faults, and prone to trip, but only if an external fault of sufficient magnitude and duration occurred.

The duration of external fault needed to trip these 87N relays was approximately one third of a second. There are 25 primary 13 kV distribution feeders emanating from the West 65th Street No. 1 area substation. Of these, 23 employ instantaneous overcurrent relays for protection. Those relays detect faults and trips in one tenth of a second or less. Thus, although faults occurred on those feeders between 2008 and 2019, none lasted long enough to activate the 87N relays.

[45] *National Fuel*, 16 N.Y.3d at 368.

By appropriate design two of the 25 feeders did not employ fast tripping times. On the evening of July 13, 2019, a distribution feeder fault on one of these feeders occurred that took four tenths of a second for its time-overcurrent relay to detect and trip. This then became the first time the 87N relays on the three transformers at West 65th Street No. 1 had been exposed to fault current lasting long enough to activate them since 2008.

Based on their performance prior to the summer of 2019, Con Edison had no reason to suspect that the neutral wire on these relays was not connected as required. Accordingly, based on the facts known there is no basis for a prudence claim related to one inadvertent employee error that occurred in 2008 that did not manifest itself until 2019.

4. There are No Costs to Disallow Even if There Is a Finding of Imprudence

The Order discusses the prudence standard in the context of the Commission's duty to set just and reasonable rates.[46] Consistent with the Commission's performance of that duty, if the alleged imprudent actions did not cause customers to bear any utility costs or expense, there is no basis for commencing a prudence proceeding. The Commission has previously found that a utility can also justify the viability and value of a program instituted after an alleged imprudent act by determining whether the expenditure itself was prudent and provided a benefit to customers.[47] Indeed, the Commission has a long-standing "policy of generally favoring the recovery of whatever expenditures a utility can demonstrate to have been prudently incurred."[48]

[46] Order at. 9.

[47] See Case 94-E-0051 - *Orange and Rockland Utilities, Inc*., Order Approving Deferral Of Power Purchase Contract Termination Costs, 1994 WL 477800 (July 19, 1994)(The Commission approved certain contract termination costs where the utility demonstrated that the terminated project was viable and the savings to ratepayers as a result of the termination justify a recovery of the costs).

[48] *Matter of Abrams v. Public Serv. Comm'n. of State of N.Y.*, 67 N.Y.2d 205, 214-215 (1986).

Consistent with the discussion above, the Commission should not commence a prudence proceeding if there are no Company costs at issue. That is the case here. First, the Order fails to cite to any specific costs related to the Manhattan Outage. Second, based on current ratemaking, Con Edison will bear the approximately $1.3 million of O&M expenses associated with the Manhattan Outage. Third, the Company searched its records and the only capital costs that are, at best, tangentially related to the Manhattan Outage are the costs for the Company's relay monitoring system that it installed after the outage. But, as shown below, the Company incurred these capital costs as a result of finding that the neutral wires were not reconnected on the 87N relays, not because of the Manhattan Outage.

The point of the relay monitoring system is to be able to detect a problem with these relays. The Company implemented its Relay Monitoring System not because of the Manhattan Outage, but because the Company discovered that the neutral wire of certain 87N relays were not connected. It is this connection issue, not the outage, that makes this system necessary. Indeed, had this issue been discovered in 2013, the Company would have implemented this program at that earlier time and spent approximately the same dollars back in 2013. In other words, the Company would have spent the money irrespective of whether the outage occurred. Moreover, this system will benefit other aspects of the transmission system, including monitoring transformer temperatures, tracking transformer voltages, and monitoring the status of other substation equipment. Because of the significant and wide-reaching benefits of the Relay Monitoring System, the costs for this system would have been spent irrespective of whether there was an outage. As such, disallowing these costs "does not protect ratepayers from, or compensate them for, new unjustified costs, because those costs would have been incurred even

if Con Ed had acted" prudently.[49] As such, there is no "but for" causation here.[50] Accordingly, the practical effect of any finding of imprudence would be to reduce rates by a *de minimis* amount at best.

Implementing a program to enhance system reliability is a prudent expenditure that provides significant customer benefits. The Company would have implemented the Relay Monitoring System irrespective of whether the Manhattan Outage occurred. As such, the costs of the Relay Monitoring System were independent of the Manhattan Outage, and the Company incurred no other capital costs that were in any way related to the outage. Thus, there are no capital costs, prudent or imprudent, that directly pertain to the Manhattan Outage.

B. There Is No Basis For A Prudence Proceeding Relating To the Brooklyn Outage

The Order states that the Report "identified facts and credible evidence" that could call into question the prudence of the Company's decision making and actions.[51] The Order, however, does not specify which acts or omissions raise such concerns or identify and does not identify any associated costs that the Company incurred that could be disallowed. Instead, the Order indicates that the reasons for inferring imprudence may be found within four categories of activities set forth in the Order[52] and in other related issues discussed on pages 34-72 of the

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[49] *Con Edison v. Pataki*, 292 F2d 338, 354 (2002).

[50] Con Edison is implementing this program to improve the reliability of these relays, to be able to detect ahead of time, without having to rely on field inspections, whether these relays are properly functioning. As such, the costs associated with the relay monitoring system clearly meet the Commission's standard of providing an important benefit to the Company's customers.

[51] Order at 4, 29.

[52] The four categories are 27 kV and 13.8 kV feeder cable testing and maintenance; relay timing and coordination; situational awareness, transformer operations and maintenance; and the absence of specific procedures for de-energizing and restoring 4 kV grids, including public communication and outreach. Order at 16, 29. The Company notes that the Report does not make any allegations regarding the Company's transformer operations and

Report.

For the reasons explained below, the Commission should decline to institute a prudence proceeding related to the Brooklyn Event. First, contrary to the Order's statement[53] that the Report concludes that the event was caused by various improper Company actions, such as feeder testing and maintenance, the Company finds no such conclusion in the Report. Instead, the Report recounts the Company's long-standing program to replace certain types of joints on its system that were previously determined to be unreliable; the Company's diligent efforts to implement this program; that certain of these joints failed during the Brooklyn Outage; and that the Company, on its own initiative, has embarked on an enhanced effort to replace these types of joints in the Flatbush network on an accelerated basis.[54] Second, the Report repeatedly acknowledges the Company's diligent, proactive, and comprehensive event preparation and response, which was designed to mitigate harm to its customers and the electric system. This includes preparing for the possibility of a heat event by taking actions based on weather forecasts indicating high temperatures for the upcoming week;[55] making good faith decisions to de-energize the 4 kV grid when it reached a seventh contingency in order to prevent a complete shutdown of the Flatbush network, which would have resulted in the loss of service to more than

maintenance or include any discussion from which any adverse inference may be drawn**.** Accordingly, the Company does not further discuss transformer operations and maintenance herein.

[53] Order at 16.

[54] Report at 43-47. The Report's single adverse comment was that one failed cable section would ultimately not be made available for analysis because the Company disposed of it prior to realizing that the failure was part of a major event. The Company explained that this cable section was part of the first feeder that failed; that the event evolved a full day later; and that it was not readily apparent at the time of disposal that the feeder failure would become part of an event. The Company acted in good faith and there is no suggestion in the Report to the contrary. Disposing of this cable did not contribute to the event, nor did it result in any costs or expenses to customers. Accordingly, the disposal of this cable specimen does not provide any basis for a prudence inquiry.

[55] Report at 26.

100,000 additional customers and potentially serious damage to system components;[56] and taking actions to restore service to customers immediately following de-energization.[57]

The Report presents its analysis of Company actions and makes various findings and recommendations. While the recommendations are prospective only, the Order appears to rely on the grounds presented for various recommendations to allege or infer imprudent Company action or inaction during the event. This is clearly contrary to the Commission's prudence jurisprudence, which expressly disclaims reliance on 20-20 hindsight to allege prudence.[58]

The Report also concludes that in some cases the Company could have taken actions, or made different decisions, that may have produced more favorable results for customers. In these instances, it is also unclear whether the Report is alleging or inferring imprudence. Here, again, the Report does not identify any costs that should be disallowed even if the Commission finds an allegation(s) that constitute imprudence.

Certain principles inherent in the prudence standard are particularly applicable to the Report's analysis and findings relating to the Brooklyn Outage:

- The Company's actions must be judged based on the information that it had, and the circumstances that existed, at the time of the event.[59] Many issues the Report raises it identifies with the benefit of data and information that were not available in real time.

- If more than one course of action is reasonable at the time of decision making, the Company may choose among them.[60] It is noteworthy that when the Report discusses the

[56] Report at 30-31.

[57] Report at 31.

[58] No adverse inference should be drawn from the fact that the Report (and the Company on its own initiative) recommended improvements to the Company's system and processes following the Flatbush Event. All events, including events where no questions of prudence are raised, present opportunities to learn and improve and recommendations for improvement are the expected result.

[59] *National Fuel*, 16 N.Y.3d at 368.

[60] *National Fuel*, 16 N.Y.3d at 369.

application of a forward-looking recommendation to the Brooklyn Event, it is often qualified with words like "may," or "seems," or "likely," implicitly acknowledging that there should be no retrospective application.

- The Company's actions must be judged in accordance with the procedures in effect during the event absent a basis for finding that the Company should have recognized the need for a specific procedure before the event. The Company's actions during the event cannot be judged by a procedure that did not exist.

- The Order discusses the prudence standard in the context of the Commission's duty to set just and reasonable rates.[61] Consistent with the Commission's performance of that duty, Company actions that did not cause customers to bear any loss or expense do not provide a basis for a prudence review.[62]

Applying these principles to the Report's evaluation of Company actions to limit 27 kV and 4 kV feeder faults (Report sections II.A & B), cable testing and maintenance (Report sections II.C, D & E), and the lack of specific procedures for a 4 kV event (Report sections II.F, G, I & K), and for the additional reasons provided below, the Commission should find that the Report does not establish any imprudent act that justifies the commencement of a proceeding.[63]

Moreover, to place the potential cost disallowance associated with this prudence inquiry in perspective, the Company estimates the cost of the work to restore the network after shutdown to be approximately $461,000, comprised of $274,000 in capital costs, $112,000 in O&M

[61] Order at 8-9.

[62] Case 06-E-0894; 06-E-1158; 06-M-1108, *Re Electric Power Outage of Consolidated Edison Co. of New York, Inc.'s Long Island City Network et al.*, 2007 N.Y. PUC LEXIS 282 at *39.

[63] Report findings regarding record keeping, after action review, and the declaration of Condition Red vs. Yellow (Report sections II.H, J & L) do not provide a basis for a prudence review, in particular, because the associated actions did not cause the Company to incur any cost or expense. Notwithstanding, as to Report concerns regarding Feeder Boss record keeping, the Company notes that the verbal report provided by the Feeder Boss was made to all persons that would have received the written update required by the Company's specification and therefore there was no gap in information during the event. Moreover, the Company has a state-of-the-art electronic feeder board and electronic operating order system that enables members of Electric Operations, Substation Operations, and other Company organizations to follow every step of the feeder process. With respect to not declaring a Condition Red, the Company explained in its Response to DPS-069(1)(b) that the Senior System Operator did not declare a Condition Red because the event did not meet the criteria as defined in Section 3.9.3 of SO5-12-30 "Guide for Action in a System Emergency."

expenses and $75,000 allocable to retirement. Based on current ratemaking, Con Edison will bear all of these O&M expenses. Accordingly, the practical effect of any finding of imprudence would be to reduce rates by a *de minimis* amount.

1. Con Edison Actions To Limit 27 kV and 4 kV Feeder Faults

a. Limiting the Impact of 27 KV Feeder Faults

The Company used manual underground sectionalizing switches to partially restore service to two of the 27kV feeders during the Brooklyn Outage. The Report suggests that automatic interrupter switches could have prevented or reduced the number of customers affected during the event, but acknowledges that this technology is only in the "prototype stage."[64] Indeed, the Report acknowledges Con Edison's pro-active efforts in 2016 to work with a manufacturer to develop this technology. And, as the Report acknowledges, prudent operating practice demands that new technology be adequately tested before being placed into service[65] because, as the Report states "it would not be practical to fully implement interrupters throughout [Con Edison's] service territory without first validating their benefits."[66] Accordingly, the Company's use of manual instead of automatic interrupter switches during the event does not give rise to a prudence claim.

b. Limiting The Impact of 4 KV Distribution Faults

The Report acknowledges that four of the thirty-seven 4 kV feeders in the Flatbush 4 kV grid did not have Kyle switches installed at the time of the event and that the Company would

[64] Report at 35.

[65] At the time of the event, the Company was still working with a manufacturer to develop these switches. Currently, the Company is continuing to field test these switches to determine if the switches will work as intended once installed and placed into service.

[66] Report at 37.

not have been able to monitor and remotely control the Kyle switches with its SCADA system.[67] Nevertheless, the Report contends that the use of Kyle switches would enable system operators to radialize the 4 kV grid. The Report then contends that this would allow 4 kV feeders to provide service to customers up to the opened Kyle switch after a fault on the feeder, limiting the effect of a single fault to customers on one-half of the 4 kV feeder.[68] The Report claims this would have reduced stress on the 4 kV grid and may have led to a lesser overall customer impact and limited equipment damage.[69] The Company disagrees.

First, the Company notes that, for good reason, the Report does not assert that the Company should have installed Kyle switches on all feeders in the Flatbush 4 kV grid prior to the event. As the Report recognizes, the "primary purpose of a Kyle switch is to sense and interrupt fault currents."[70] As part of the lessons learned from this event, the Company determined and developed an ability, with newly enhanced SCADA control functions also developed after the event, to use Kyle switches to radialize the 4 kV grid.

After the event, as part of its lessons learned, the Company developed SCADA overhead group control functions to radialize a 4 kV grid, which is unique to that kind of grid.[71] Accordingly, even if Kyle switches had been installed on all 37 feeders prior to the event, the Company could not have radialized the grid remotely as this new, enhanced capability was not

[67] Report at 39.

[68] Report at 38.

[69] Report at 39. The Company also notes that the Report does not say when the Company should have radialized (*e.g.*, after which contingency) or recognize that radialization would have accelerated load shedding for some customers even if such action may have reduced overall load shedding. Moreover, the Company reiterates that the action it took also limited equipment damage.

[70] Report at 38.

[71] DPS-074.

yet in place.

The Report further acknowledges that Company specification EO-4095 in effect during the event discouraged operating the 4 kV in radial mode.[72] Moreover, the Report's recommended guideline recognizes the need for operator judgment because it states that going forward "Con Edison should operate the Flatbush 4 kV grid and other 4 kV grids that are supplied by a network system in radial mode when appropriate."[73]

Finally, no adverse inference should be drawn from the Company operating in radial mode after de-energization.[74] The two situations are different. Changing to radial operation when the system is energized without the new overhead SCADA group control technology (which, as described above, the Company developed after the event) risks damaging the power grid due to changing power flows within the grid. There is no such risk during the restoration process when the system has been de-energized.

2. Cable Testing and Maintenance

a. Minimizing Relay Sensitivity

The Report recounts that during the event two 27 kV feeders disconnected due to operation of their phase balance relays; that the Company treated each disconnect as it would a feeder failure and performed a high potential ("Hipot") voltage test even though the Company did not observe any corresponding feeder faults at that time; and that a post-event review of data

[72] Report at 39. Also, the Report's recommendation for the Company to operate in radial mode, and to modify EO-0495 accordingly, are premised on the fact that Kyle switches have now been installed on all feeders in the Flatbush 4 kV network and that enhanced SCADA control functions are now available to operators.

[73] Report at 40.

[74] The Report (at 38) states "Interestingly, following the de-energization of the 4 kV grid, the first step the Company took was to place the de-energized Flatbush grid in radial mode by opening Kyle switches. The Company operated the 4 kV grid in a radial mode as restoration was occurring."

indicated that these two Hipot tests could have been avoided.[75]

The Company's performance of Hipot tests was reasonable under the circumstances. First, the Company had never before experienced this type of relay misoperation.[76] Therefore, it was reasonable for the Company to treat the situation as a feeder failure. The Report acknowledges that the activation of the phase balance relays in the absence of a feeder fault, even though both relays were operating within the manufacturer's specified limits, *seemed unusual*; that the relay operations *appeared to have been outside of the Company's control during the event*; and that "[a]s demonstrated during the Brooklyn event, *improper imbalance relay operations are not something Con Edison can plan for and are often random in nature*" (emphasis added).[77]

Second, since the Company could not determine whether the relay was operating incorrectly or if there was an actual feeder fault that was not detected by power quality equipment, it was reasonable for the Company to be concerned that the feeder would fail if the Company attempted an immediate restoration. If there had been a fault on either or both of the feeders, the entire network would have had overvoltage conditions on the attempt, which could have led to more feeder failures. Accordingly, in the interests of safety, reliability and system integrity, the Company elected not to place these feeders back into service without first performing Hipot tests.[78] As discussed *supra,* if more than one course of action is reasonable, the Company may choose among them.

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[75] Report at 40-43.

[76] See Consolidated Edison Company of New York, Inc. *Review of July 21, 2019 Flatbush Network Event*, at 25, October 2, 2019.

[77] Report at 41-43.

[78] The Company discusses below its reasons for exercising caution during restoration.

It took several days of analysis after the event for the Company to be in a position to confirm that the feeders had not faulted in a manner that caused the feeders to open automatically. The prudence of the Company's decision to perform Hipots, however, cannot be judged based on hindsight that benefits from a post-event analysis that could not reasonably have been performed at the time a decision was required, particularly for something that the Report acknowledges seemed unusual and beyond the Company's control.[79]

b. High Potential Testing of Primary Feeders

The Report notes that use of Hipot tests during an event is outlined in a Con Edison specification that allows for Hipot tests to be waived (or deemed not required) in certain instances.[80] The Report concludes that the Company waived the tests on two feeders for a valid reason (*i.e.*, faster restoration of a feeder), but notes that this reason is not explicitly outlined in the Hipot testing specification.[81] With the benefit of the Report's discussion of this issue, the Company has determined that the Hipot tests waived for these two feeders is covered by the specification.[82] Moreover, these waivers do not raise a prudence issue because they facilitated service restoration and did not result in any cost or expense to customers.

As part of the Report's section on Hipots, the Report also discusses the uses of Hipots outside of an event as part of the Company's cable maintenance program. Here, no adverse

[79] After the event, on its own initiative, the Company developed tools to assist operators in evaluating power quality data to aid in decision making and make an event like Flatbush less likely. The Report (at 42) also recognizes the Company's proactive pursuit of a program to replace the existing phase balance relays in order to enhance the means for the Company to detect and clear faults at 4 kV unit substations throughout the Company's territory.

[80] Report at 47-48.

[81] Report at 49.

[82] The specification at the time of the incident said "Waive the Hipot on the good portion of a feeder that has been sectionalized via switch or live end cap, if the waiver criteria in Section 6 or Section 7 have been met. For feeders covered under Section 6, the good portion of the feeder must not include any of the highlighted RTF zone (unless the Fault location has already been identified and is not on the good portion of the feeder.)"

inference can reasonably be drawn from the Report recommendation to further improve and strengthen the program. In fact, the Report acknowledges that the Company's current specification is modelled on an IEEE standard; that the Company has played an active leadership role in the development and revision of this standard; and that the Company has explored numerous other options to develop a predictive maintenance strategy towards distribution feeders, which proved to be impractical to implement due to Con Edison's complex network design.[83]

3. Lack of Specific Procedures For 4 kV Grids

The Report recommends that the Company develop procedures for de-energization, restoration, voltage reduction, and the use of mobile generators with respect to 4 kV grids. Nevertheless, the Report does not identify any events, facts, or other circumstances before the event that would have given the Company reason to consider whether its general procedures or practices should be modified to develop specific 4 kV procedures. Where there are no facts or circumstances that would lead a reasonable person to conclude that special procedures are warranted, reliance on general procedures and practices is not imprudent.

Starting from this premise, the Company addresses below the additional Report allegations and inferences regarding 4 kV de-energization, restoration, voltage reduction, and mobile generator deployment, and explains why these allegations and inferences provide no basis for a prudence inquiry.

a. Lack of Specific Procedures or Guidance to De-Energize or Restore 4 kV Grids

The Report states "[t]he absence of a [written] procedure for de-energization of a 4 kV

[83] Report at 50.

grid added confusion to an already chaotic operating environment, created disorder between the Company's control rooms, and resulted in no restoration planning prior to dropping service to more than 30,000 customers."[84] The principal purported "evidence" for these conclusions is a review of operator phone calls that the Report claims demonstrate operator uncertainty about where de-energization of the Flatbush grid could be performed and how long the operation would take.[85] According to the Report, calls seeking clarification disrupted operators. For the reasons given below, these operator calls do not constitute evidence in support of the Report's findings.

First, and notably, the Report does not question the Company's decision to de-energize the network, and the Commission should reject any inference that the Company was unable to implement the 4 kV grid de-energization. Here, the Report acknowledges that the de-energization order was executed by the Company's Brooklyn/Queens Control Center after a delay of only a matter of minutes that were attributable to technical issues associated with the initial attempt.[86] The Report should have instead acknowledged the Company's foresight in establishing multiple control centers to manage the system during events and successfully work past technical issues that are bound to arise during an event, which was the case for the Brooklyn Event.

Second, the Company's engineers, not its control room operators, develop restoration plans. Furthermore, the Report acknowledges that the Company promptly began working on

[84] *Id.* at 53.

[85] *Id.*

[86] *Id.* at 54.

restoring customers following de-energization.[87]

Third, the Company explained its restoration process for the 4 kV grid in response to Staff interrogatory DPS-002(1).[88] Fourth, the Commission should accordingly draw no inference from the Report that the Company could have or should have engaged in extensive restoration planning prior to de-energization. The Company must develop the restoration process based on system conditions at the time the de-energization decision is made. As explained above, the initial restoration process for the 4 kV grid is based upon a general methodology and thereafter tailored to the specific conditions that triggered the de-energization and, as needed, to other conditions and circumstances that arise during restoration.

The Report seeks to further support its conclusion that the absence of a written specification for 4 kV grid restoration is "a clear inadequacy that needs to be rectified" by making the unwarranted criticism that the Company should not have exercised caution in re-energizing certain 4 kV feeders.[89] The Report asserts that with the benefit of a written specification that reflects feeder loading thresholds and best practices for feeder load analysis, Con Edison operators would have had a more defined process to determine adequate measures to restore 4 kV feeders in a way that did not negatively impact the loading on source distribution

[87] *Id*. at 31.

[88] See following excerpt from the response to DPS-002(1): "…At approximately 19:32 hours during the fifth contingency the Company's operators dropped the entire Flatbush grid by opening the remaining bank breakers that were in service at 9 individual unit substations. The general methodology of restoration was to radialize each one of the unit substations in the 4 kV grid. The Company targeted first for switching operations the unit substations' whose 27 kV feeders were in service. The methodology for each of the unit substations was to open overhead single-phase Kyle reclosers located in the middle of the 4 kV feeder and open the 4 kV feeder breakers at the unit substation…"

[89] Report at 56-58.

feeders in the Flatbush network.[90]

The Report makes no showing that the process it describes would eliminate the need for caution or have changed restoration times. The Company's goal was to preserve service to the more than 100,000 customers served by the underground facilities in the Flatbush network while restoring feeders that serve the 30,000 customers on the 4 kV grid that lost service, and to avoid some or all of the 30,000 4 kV grid customers from experiencing a second service outage that could otherwise be avoided. Exercising caution in restoring 4 kV feeders was consistent with these goals, which the Company achieved.

Based upon a post-event analysis of the Company's overall restoration efforts, the Report notes the possibility that some customers served by six feeders that took 8.5 hours on average to restore could have been restored in 4 hours because the Company restored other feeders in a similar state in 4 hours.[91] The Report asserts that "[h]ad restoration methods for the six feeders failed, further cascading failures to the 4 kV grid would not have occurred in the manner they would have during the restoration of a traditional network."[92] The Report misstates the Company's concern. The Report is correct that the 4 kV grid, which was operating in radial mode during restoration, would not be subject to cascading failures. But the Report's conclusion regarding the possibility of cascading failures is not correct with respect to the Company's 27kV network feeders and the Flatbush network.

During the period that the Report says the Company should have been more aggressive in restoring 4 kV feeders, the 27 kV Flatbush network that was continuing to serve 100,000

[90] As to this aspect of the Report's post-event load analysis (at 57), the Company notes that feeders can fail below their emergency ratings and that loading thresholds are not the only factor.

[91] Report at 57.

[92] *Id.*

customers was in a fifth contingency (with one feeder having been restored at the beginning of the 4 kV grid shutdown). From approximately 7 p.m. on July 21 through approximately 4 a.m. on July 22, in addition to restoring six 4 kV feeders, the Company diligently worked to restore significant portions of two additional 27 kV feeders, thereby helping to improve the condition of the network system, thus giving the operators more opportunity to restore additional 4 kV feeders and then pick up additional customers. Nevertheless, (i) the Company was still operating above a second contingency in the network (and thereby continuing to operate beyond design conditions); (ii) was still forecasting heat wave conditions for July 22; and (iii) was therefore heading back into the time period when both temperature and customer usage would begin to increase.

Notwithstanding the Company's diligent feeder restoration during the first eight hours of the 4 kV grid restoration period, the Company had a reasonable concern as to when the other 27 kV feeders would be restored. Also, it was critical to properly secure the remaining "in service" 27 kV feeders since the loss of any additional feeders would dramatically increase the probability of the next feeder failing in a nonlinear fashion. And once a network loses one feeder, the probability of the next feeder failing also increases in a non-linear fashion. The Report asserts that three of the six 4 kV feeders that should have been restored more aggressively were associated with one 27 kV feeder. But the Report ignores that the Company sought to avoid a cascading impact that would have occurred if that 27 kV feeder failed, which would have sent another 27 kV network feeder over its emergency rating. This would have adversely impacted the network customers in addition to those served by the 4 kV grid.

For the foregoing reasons, the Report's unsupported speculation about a more aggressive approach does not make the Company's decision to exercise caution in restoring 4 kV feeders

during the event imprudent. The Report concedes that it was only a possibility that a more aggressive approach could have restored service to up to 4,000 customers sooner. The Company determined that the risk to the 100,000 network customers that could have lost service if the more aggressive approach led to additional 27 kV feeder failures outweighed the limited potential benefit. While the Company had every incentive to restore service to customers as soon as practicable, and endeavored to do so,[93] the Company was correct to balance faster restoration with preserving the integrity of its system and avoiding additional events. For the Report to second-guess the Company's decision to proceed in the manner that best-served *all* potentially affected customers is exactly the type of 20-20 hindsight that the Commission's prudence jurisprudence excludes. Moreover, assuming that the Commission could find risking service interruptions to other customers in the Flatbush network to *potentially* restore some 4 kV grid customers sooner to be a reasonable option (which it is not), the Company's course of action was still reasonable and, as discussed *supra*, where there is more than one reasonable course of action, the Company may choose among them. Finally, even with the benefit of hindsight, it would be unreasonable to presume that the more aggressive approach posited in the Report would not have caused additional failures that could have had a cascading impact on the 27 kV network, thereby adversely affecting a far greater number of customers.

In short, other than asserting that it was possible for the Company to have more quickly restored service to some unstated number of customers by several hours, the Report takes no issue with the totality of the actions the Company took to restore service to all customers on the Flatbush 4 kV grid. And, neither the Order nor the Report identifies any costs that were incurred

[93] It bears mention that while the Report criticizes the Company for exercising caution in bringing back certain 4 kV feeders, the Company was pursuing parallel paths to facilitate customer restoration through the use of mobile generators.

and for which recovery should be disallowed because the Company took a "more cautious" approach.

b. Length of 8% Voltage Reduction

The Report finds the decision to implement voltage reduction appropriate but says that the duration of the 8% voltage reduction "seems excessive," claiming that the Company had the opportunity to reduce the voltage reduction to 5% or terminate the voltage reduction sooner.[94]

The Company disagrees. First, reducing or terminating voltage reduction at an earlier point in time could have resulted in an event since voltage reduction reduces the likelihood of open auto feeders that the Company may otherwise experience. There is no basis for assuming that this would not have occurred if the Company had changed the voltage reduction from 8% to 5% at an earlier point in time.

Second, where there is more than one reasonable course of action, the Company may choose among them. As discussed above, the Company's operational philosophy during emergency conditions is to maintain system reliability, which includes not prematurely reducing voltage reduction. Moreover, the Report does not present an alternative course of action, but simply notes that the Company's course of action during the event "seems excessive."

Third, the Report suggests that "light load periods" the Company experienced when an 8% voltage reduction is in effect provides the opportunity to reduce or terminate the voltage reduction. The Company disagrees that there was a reasonable opportunity to do so.[95] And as the Report acknowledges, the Company acted in accordance the voltage reduction algorithm

[94] Report at 62.

[95] For example, as discussed above, although the Company experienced lower temperatures and lighter load during the overnight hours of July 21 - July 22, the Company was still in a third contingency when heading into heat wave conditions the following morning.

contained in its then-existing procedures (*i.e.*, the Company decided to maintain the 8% voltage reduction because the voltage reduction algorithm contained in EOP-5022 recommended active voltage reduction until the network, at a minimum, returned to an N-1 condition).[96] The Report does not explain why a light load period during the outage would have provided a basis for the Company to deviate from its then-existing procedure.

Fourth, the Report's interest in the Company applying an American National Standards Institute ("ANSI") Standard to limit voltage reductions cannot be applied retrospectively to the event.[97] While the Report expresses the belief that this ANSI standard should not be ignored because of the impact that an 8% voltage reduction may have on the equipment of certain customers,[98] the Company acted in accordance with its then existing procedure and there is no basis in the Report to infer that the Company should have done otherwise.

Finally, the Report acknowledges that "[a]lgorithms cannot conceivably account for all real-time situations of an electrical network. Humans must make the ultimate decisions."[99] The Company agrees with this determination. Further, where procedures or algorithms provide discretion to operators, the reasonableness of such decisions must be based on the facts and circumstances of the specific event in which they are made without reliance on hindsight.

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[96] Report at 62-63.

[97] The Report (at 63-64) agrees with the Company that the Flatbush network is designed for N-2 contingency; that the Flatbush Event involved multiple feeder outages; that by definition, this ANSI standard is not applicable to N-2 designed networks; and that there is no basis to speculate what an ANSI voltage reduction standard for an N-2 network would be.

[98] No adverse inference should be drawn from Staff's statements that Con Edison does not have reliable or granular data for the impact that the 6th contingency feeder failures could have had on voltage experienced at the individual customer level, or that the Company could not speculate whether the Flatbush network customers experienced any increased potential for degradation effects on their electrical equipment (Report at 62). The Company has no obligation to develop, purchase and/or install such monitoring equipment.

[99] Report at 64.

c. Deployment of Mobile Generators

The Report acknowledges that Con Edison acted appropriately in securing generators to provide grid support and temporarily restore some customers, and that the customers restored using generators would have otherwise faced longer outages.[100] Accordingly, the Order rightfully does not list mobile generator deployment among the activities that may provide a basis for a prudence inquiry. The Report, however, also states that improvement opportunities were observed and that some customers may have had service restored faster if the Company had been following a guideline on prioritization of generator deployments.[101] There is no basis for this statement.

For example, contrary to the Report's conclusions that a generator was sent to the wrong location at a substation and not used to restore customers, the Company correctly deployed this generator and used it to temporarily restore service to customers.[102] The Report should have acknowledged that the Company proactively pursues two plans in parallel to try to restore customers because the Company cannot predict with certainty when a feeder will be restored. Because restoring customers from the system is the preferred approach, it makes sense for the Company to change its plans to use a mobile generator to restore customers if the system restoration alternative becomes available at or about the time that the mobile generator can be turned on.

C. Con Edison Reasonably Complied with its ERP with Respect to its Communication Activities During the Manhattan and Brooklyn Events

The Order alleges that Con Edison committed seven violations of its ERP during the

[100] Report at 67.

[101] *Id.* at 67, 69.

[102] *Id.* at 68-69.

Brooklyn outage and one violation during the Manhattan outage that make it potentially subject to a penalty under Public Service Law section 25-a.[103] As discussed below, the Company reasonably complied with all ERP requirements, to the extent applicable, as some of the alleged violations were not actually violations as the Order read requirements into the ERP that do not exist.

1. The Reasonable Compliance Standard

Section 25-a of the Public Service Law authorizes the Commission to assess a penalty only if it finds by a preponderance of evidence that a utility failed to "reasonably comply" with the Public Service Law or an order or regulation adopted thereunder.[104] Under the preponderance standard, the Commission must find "clear and convincing" evidence that a utility did not reasonably comply with a requirement.[105] Here the evidence is "clear and convincing" that Con Edison did reasonably comply with the ERP and that the commencement of a penalty proceeding is not justified.[106]

In interpreting the reasonable compliance standard, it is appropriate to look to how courts have interpreted "reasonable compliance" in analogous contexts, *e.g.*, when determining whether a penalty is appropriate because a party did not comply with a court order. When assessing reasonable compliance with their orders, courts look for "diligent and energetic efforts to comply

[103] Order at 19-25.

[104] Public Service Law § 25-a (3), (5).

[105] *McKeon v. VanSlck*, 223 N.Y. 392, 397 (1918) (explaining that "to make out a preponderance, the evidence should be clear and convincing."); *see also Ross v. Food Specialties*, 6 N.Y. 2d 336, 334 (1959). The preponderance standard imposes a higher burden of proof than the substantial evidence standard under which the Commission and the Department normally operate. *See e.g., 300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180–81 (1978) (explaining that substantial evidence "is less than a preponderance of the evidence."); *Miller v. DeBuono*, 90 N.Y.2d 783, 793 (1997).

[106] While reasonable compliance is the legal standard for avoiding a penalty, Con Edison strives for excellence in meeting customer expectations and complying with all regulatory requirements.

in a reasonable manner."[107] If a party has been "reasonably diligent and energetic in attempting to accomplish what was ordered,"[108] it has reasonably complied with the order even if it has not "exhaust[ed] all means available."[109] Similarly, in determining reasonable compliance with contracts, courts look past minor deviations and delays to determine if the responsible party ultimately accomplished what was required in an acceptable manner.[110] Consistent with this approach, the Commission has approved plans because they "reasonably assure[]" compliance with Commission requirements.[111] In other words, the standard of reasonableness is not a standard of perfection.

The legislative history confirms that the legislature deliberately chose not to authorize penalties on a strict liability basis.[112] Section 25-a originated in the Moreland Commission's

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[107] *Zino Davidoff SA v. CVS Corp.*, No. 06-CV-15332, 2008 WL 1775410, at *13 (S.D.N.Y. 2008); *accord Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir.2004) (quoting *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir.1995)). In contrast, courts find a lack of reasonable compliance when the responsible party takes an "apathetic" or "generally lethargic" approach to compliance, *Casale v. Kelly*, 710 F. Supp. 2d 347, 360, 362 (S.D.N.Y. 2010) (describing New York City's failure to diligently comply with a court order in a reasonable manner), fails to "diligently implement [its] program of compliance," *Int'l Controls & Measurements Corp. v. Watsco, Inc.*, 853 F. Supp. 585, 591 (N.D.N.Y. 1994) (describing the standard for showing reasonable compliance with a court order), makes "token attempts to secure compliance," *New York Times Co. v. Newspaper & Mail Deliverers' Union of New York & Vicinity*, *No.* 92 CIV. 3345 (PNL), 1992 WL 110721, at *3 (S.D.N.Y. May 12, 1992) (describing efforts that fell short of the reasonable compliance standard), or evinces "a sense of non-urgency bordering on indifference," *Aspira*, 423 F.Supp. at 654.

[108] *Aspira*, 423 F.Supp. at 654.

[109] *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 293 (2d Cir. 2008) ("Gotham sought the advice of counsel before adopting its overtime policy; it made its nurses aware of the rule; it discouraged its nurses from accepting overtime shifts without seeking prior approval and discouraged its clients from offering those shifts; and, when its instructions were disregarded, it negotiated with the hospitals to procure an overtime premium retrospectively. While these steps did not exhaust all means available to Gotham to ensure that overtime was not performed . . . they are evidence of Gotham's diligent and energetic efforts to comply in a reasonable manner with the 1994 consent judgment.").

[110] *Cf. Harris v. Gen. Accident, Fire & Life Assur. Corp.*, 187 N.Y.S. 291, 293 (App. Term 1921) ("While the law does not require at all times strict compliance with the provisions and special agreements contained in policies of insurance, but is content with a fair and reasonable compliance [citation omitted], it does at all times require some compliance.").

[111] *Cassadaga Wind* at 4.

[112] *People v. Coe*, 71 N.Y.2d 852, 854-855 (1988) ("In the absence of a clear legislative intent to impose strict criminal liability, such construction should not be adopted").

recommendation that the legislature authorize the Commission to assess penalties "upon a finding that [a] utility has failed to provide safe and adequate service under a 'reasonable business' standard (comparable to the prudence standard)."[113] When the draft legislation did not reflect a reasonable compliance standard, the legislature specifically added it back in before enacting it into law.[114]

Finally, to the extent there were any doubt as to the appropriate standard of liability, New York law requires a narrow construction. Because section 25-a is penal in nature,[115] the Commission must strictly construe the limits on its authority and honor the reasonable compliance standard.[116] The Commission has no authority to assess a penalty where, as here, the Order has not even alleged, let alone demonstrated, that Con Edison failed to "reasonably comply" with the ERP. Moreover, as the next sections of this response demonstrate, Con Edison

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[113] Moreland Commission on Utility Storm Preparation and Response, Interim Report (issued January 7, 2013) at 6.

[114] 2013 Assembly Budget Recommendations, p. 64-1.

[115] *See, e.g. City of New York v. Verizon N.Y., Inc.*, 4 N.Y.3d 255, 259 (2005) (holding that a statute "operates as a penal statute because it imposes civil fines without regard to the City's actual costs"); *People v. Consolidated Edison Co. of N.Y.*, 41 A.D.2d 809, 810 (1st Dept. 1973) ("A statute which prescribes a civil penalty is penal in nature and must be construed strictly in favor of the party against whom the penalty is sought to be imposed."); *see also People v. Whitridge*, 144 A.D. 486, 489 (1st Dept. 1911) (holding that a statute that authorizes a penalty action is "very highly penal") *aff'd* 204 N.Y. 646 (1912).

[116] *Thruway Authority*, 315 N.Y.S.2d at 957 ("It is familiar law that a statute imposing a penalty or forfeiture shall be strictly construed and is not to be extended by implication or construed to cover cases not clearly within its terms . . . . It follows that the statutory provisions here under consideration may not be liberally construed and extended beyond the explicit authorization so as to vest in plaintiff the right to recover the penalty."); *Consolidated Edison Co.*, 41 A.D.2d at 810 ("A statute which prescribes a civil penalty is penal in nature and must be construed strictly in favor of the party against whom the penalty is sought to be imposed."); *Hurley Water Co.*, 84 A.D.2d 615, 616 (3d Dept. 1981) (holding that where a statute is "penal in nature in that it provides for the imposition of a fine for the violation of a PSC order, the related section should be strictly construed and not extended to cover cases not clearly within its terms"); *Satra v. Brooklyn Edison Co*., 285 N.Y.S. 794, 794 (App. Term 1936) (holding that a provision of the Transportation Corporations law establishing penalties for failing to provide electric service was "penal in nature" and "must be strictly observed"); *McMullin v. New York Power & Light Corp*., 284 N.Y.S. 869 (Sup. Ct. 1935), *aff'd*, 249 A.D. 695 (3rd Dept. 1936) (holding that a provision of the Transportation Corporations law establishing penalties for failing to provide electric service was "penal in nature and must be strictly construed."); *Callanan Indus., Inc. v. White*, (118 A.D.2d 167, 169 (3d Dept. 1986) ("The power to investigate violations of a statute and to punish violators is a significant power and is penal in nature."); *see also* N.Y. Stat. Law § 271 ("Generally, penal statutes are strictly construed against the State and in favor of the accused.").

was diligent and energetic in complying with the ERP; isolated instances of imperfect compliance do not render its compliance unreasonable or subject to a penalty.

2. Con Edison Used Updated Municipal and Elected Officials Lists

The Order alleges that Con Edison failed to update and use a regional contact list during the Brooklyn de-energization resulting in two distinct violations. Those allegations are based on incorrect facts and, therefore, cannot serve as the basis for a penalty action. Indeed, the Order admits that the allegation is based on "information and belief"[117] but provides no basis for even this information or belief. To the contrary, the opposite is true because the Company answered an interrogatory in the case that made the Department aware that the Company had updated these lists in May 2019, shortly before the Brooklyn Outage.[118]

In addition, the Company has a list of regional organizations and local elected officials and used those lists during the event.[119] In response to a Department interrogatory, the Company provided a list of local and regional officials the Company communicated with during the Brooklyn Outage.[120] This list details communications the Company had with officials or staff members representing the Flatbush area of Brooklyn including State Senators and Assembly members, New York City Council members, Council Board members, Congressional

[117] Order at 18.

[118] DPS-102(3). The Order and the Staff Report do not discuss this Company interrogatory response, which states that the Company both updated and *used* this list.

[119] It is unclear how the Department reached the conclusion that "…Con Edison indicated that a comprehensive contact list by region for external organizations, which include elected officials, does not exist under its internal Communications with the Public During Load Management Power Outage Procedure." (Report, pp 90-91). The cite for this claim is to Section 4.1 Corporate Instruction 260-7 Guidelines for Communications with the Public during Load Management Power Outages. Section 4.1 assigns responsibilities for communications during a load management power outage event, which is in no way evidence that the Company does not have a list. The Order (at 18 n. 40) cites to page 79 of the Staff Report, but that page of the Staff Report provides no basis for any belief that Con Edison did not update and use its list.

[120] DPS-39(2), Attachment 1.

Representatives and the Mayor, Comptroller, New York City Council Speaker, Public Advocate, and Brooklyn Borough President. This comprehensive response demonstrates that the Company reasonably complied with the ERP requirements for communications with municipal and elected officials.

In short, there is no basis for commencing a penalty action with respect to these factually flawed allegations.

3. Con Edison Complied with the ERP's Press Release Requirements

The Order alleges one violation of the ERP by claiming that Con Edison violated section 5.3.1 because "each Con Edison press release must include certain information" and "Con Edison failed to meet these requirements during the Brooklyn Outage."[121] The Order makes a series of allegations about different press releases issued by Con Edison but does not link any of the specific allegations to a specific ERP requirement.[122]

The Order's principal concern appears to be that Con Edison's press releases did not mention the potential for outages because the Order states that "communication through press releases regarding potential outages is an important component of protecting the public health and safety of the Company's customers."[123] The Order, however, does not cite any ERP requirement that requires a discussion of the potential for outages. Indeed, elsewhere the Order quotes the ERP – which requires the Company to include information about "outage procedures and the restoration process, provide information on how the company prioritizes restoration, and

[121] Order at 20.

[122] The Order in this section on press releases appears to state in error that Con Edison failed to hold *press briefings, i.e.*, this section, after describing its press release concerns, states, "[b]ased on the foregoing, the Department submits that Con Edison is in apparent violation of ERP § 5.3.1 by failing to hold any press briefings during the Brooklyn outage." Order at 21.

[123] Order at 21.

emphasize the steps customers should take during a service outage"[124] – but does not mention the potential for outages. The Company's press releases met each of these ERP requirements.

The Company issued a 5:15 p.m. press release, which was approximately two hours before the event. Even if the ERP required notice of the potential for outages (which it does not), at that time Con Edison could not reasonably have predicted that additional feeder failures would create the potential for a cascade and that it would be required to de-energize the 4 kV grid.[125] Con Edison specifically crafted the press release as a customer appeal to conserve energy.[126] The ERP does not require the Company to issue press releases that include unwarranted "predictions."[127]

As early as July 15, 2019, Con Edison issued a press release in anticipation of the heat event that included information on energy saving tips, reporting outages, and obtaining restoration information. On July 18, 2019, Con Edison issued a press release that warned customers about the expected heat wave, the resources the Company had mobilized for the event as well as its website, and phone information on how to contact the Company for outages. As events related to the heat wave occurred, Con Edison crafted its press releases to address those

[124] *Id.* at 20 (emphasis in original).

[125] Notably, Staff is now recommending for the first time in its technical recommendations that the Company include this as an ERP requirement (but only where practicable). The Company responds to this recommendation in its separate response.

[126] DPS004(2).

[127] The Order states that "the Brooklyn outage and its precursors occurred in phases over a days-long heat event giving Con Edison adequate time to issue timely and relevant press releases." The Order then cites Con Edison's demand response appeals on July 18, 19 and 20 and alleges that "despite the awareness of these phases and the possibility of an outage" the Company failed to issue press releases for potential outages. (Order at 20-21). The Order's characterization of the Brooklyn Outage as a phased event is incorrect. It was not clear that de-energization would be a possibility until moments before the Company had to act after unexpectedly losing multiple feeders in rapid succession.

new conditions.[128] From July 21 to July 23, Con Edison issued 12 press releases that included specific information about the southeast Brooklyn outages. These frequent press releases demonstrate that Con Edison more than reasonably complied with the ERP's press release requirements. And, the only allegation is not based on an ERP requirement.

4. Con Edison Reasonably Complied with the ERP's Press Briefing Requirements

The Order alleges that Con Edison violated ERP section 5.3.1 by failing to hold any press briefings during the Brooklyn Outage. The allegation cannot form the basis for a penalty action because there was no requirement under this section to conduct press briefings.

Section 5.3.1. provides that the Company manages press briefings in accordance with its Communications Plan.[129] Exhibit A to the Communications Plan details time periods for conducting press briefings, if required, by an ONIM triggering event.[130] The Order relies on Exhibit A for this alleged violation, stating that "[t]able A expressly requires the Company to … *undertake press briefings* upon the occurrence of 40,000 customer outages."[131] The Order misstates the requirements under Exhibit A because this press briefing requirement applies only when 40,000 or more outages occur in *one network area*.[132] But, during the July 19 through July 22 heat wave, there were 40,000 customers simultaneously out of service across multiple

[128] Brooklyn DPS-004(2), Attachment 1.

[129] Con Edison 2019 ERP, Attachment 3, §3.5.

[130] ONIM Order, Attachment A.

[131] Order at 22.

[132] The Order erroneously states that Con Edison's ONIM Report indicated that there were 40,000 customer outages *across its network* during the Brooklyn event (Order at 22, emphasis supplied). The Company's ONIM Report clearly indicates that the 40,000 customer outages were system-wide and spread throughout the Company's service territory (*see* footnote 137). Con Edison has 84 distinct networks, and it appears that the Order mis-interprets the meaning of the word network and views it to mean the entire Con Edison territory.

networks/load areas. [133]

Here, there was no single network with 40,000 or more outages. There was only one network that experienced a significant number of outages during this heat event – the Flatbush network – and its maximum number of customers out at one time was approximately 33,000. Accordingly, no violation occurred.

5. The ERP Does Not Mandate Blast Emails

The Order alleges two violations, that Con Edison failed to issue "ERP-required" blast emails for each of the Manhattan and Brooklyn Outages as required by ERP Section 5.5.2. The Order, however, fails to recognize that the ERP in effect at the time of these outages did not require the use of blast emails but simply listed blast emails as one of many tools Con Edison can use to communicate with customers.

Section 5.5.2 describes the information that Con Edison includes in blasts emails when and if they are used. This section does not include a requirement that the Company must use blast emails, nor does it contain a trigger for when blast emails should be issued if used.[134] Therefore, Section 5.5.2 of the ERP cannot serve as the basis for a penalty action for either event.

6. Con Edison Reasonably Complied with ETR Requirements

The Order alleges that Con Edison failed to provide specific, timely, accurate and updated estimated times of restoration ("ETR") violating ERP sections 6.6.1 and 6.6.2 and

[133] At 9:38 pm on July 21, 40,000 customers were simultaneously out of service for two hours, but the outages were "system-wide" and spread throughout the Company's service territory. Case 16-E-0060 Consolidated Edison Company of New York, Inc. Report on Notification Incentive Mechanism Performance for the July 21, 2019 Customer Outages, pp. 2-3, note 3-4, September 23, 2019.

alleges two distinct violations.[135] The Order correctly notes that ERP section 6.6.2 states that the Company will establish and communicate ETRs in accordance with the Commission's ETR Protocol. The Commission's ETR Protocol, however, did not apply to heat related outages in July 2019 and these allegations cannot serve as the basis for a penalty action.

First, the ETR Protocol in effect during the Brooklyn Outage was applicable to storm or storm-like electric emergencies;[136] it did not refer to heat related outages or de-energization required to protect the system. The Commission changed the ETR Protocol in 2020 to define a outage event as "…either a major storm, as defined in 16 NYCRR §97.1(c) or another electric service interruption or electric emergency."[137] The Commission's after-the-fact addition of "electric service interruption or electric emergency" only underscores that the ETR Protocol in effect at the time did not apply to the event; the Commission cannot give the new language retroactive effect by reading it into the prior version. The Commission cannot now expand the definition of storms to correct the ambiguity included in its ETR Protocol in an attempt to impose financial penalties where none are prescribed.[138]

Second, even if the 2019 ETR Protocols were applicable, there are certain requirements that would not apply. For example, the concept of start of restoration does not apply to heat

[135] Order at 25. As a threshold matter, there cannot be two separate and distinct violations for these ETR sections. §6.6.1 is included in a section on guiding principles of restoration and refers to §6.6.2 for how to manage estimated times of restoration.

[136] Con Edison 2019 ERP, Attachment 13 at 242 of 385.

[137] Con Edison 2020 ERP, Attachment 12 at 342 of 547. This definition change does not address the core requirements of the ETR Protocol, which in many instances are either inapplicable or impossible to execute during a heat related outage event.

[138] *Hurley Water Co.*, 84 A.D.2d 615, 616 (3d Dept. 1981) (holding that where a statute is "penal in nature in that it provides for the imposition of a fine for the violation of a PSC order, the related section should be strictly construed and not extended to cover cases not clearly within its terms"); *People v. Consolidated Edison Co. of N.Y.*, 41 A.D.2d 809, 810 (1st Dept. 1973) ("A statute which prescribes a civil penalty is penal in nature and must be construed strictly in favor of the party against whom the penalty is sought to be imposed.").

events, which is confirmed by the ERP language that defines start of restoration based on storm-like criteria such as safely dispatching crews post storm or whether access to facilities is limited by severe flooding.[139] These criteria do not apply to a heat event.

Despite the inapplicability of the ETR protocols, the Company communicated with customers and other stakeholders in numerous ways. As previously noted, from July 21 to July 23, Con Edison issued 12 press releases that included specific information about the southeast Brooklyn outages. Because of the uncertainty with feeder restorations, the Company's use of general language in its press releases was appropriate and reasonable. Con Edison's general language provided customers and other stakeholders with information that enabled them to understand the scope of the event and the Company's progress.

Other methods the Company used to communicate with customers included specific ETRs on July 21 and July 22 for customers that reported their outages; the Company's outage map, which was updated every 15 minutes; the interactive voice response system, which was updated every 3-4 minutes; customer service representatives who received updated information every 3-4 minutes; the Check Status feature on the Company website, which was updated every 3-4 minutes; and calls or texts.[140] These numerous communication activities demonstrate that the Company reasonably complied with the general intent of the ETR requirements, *assuming arguendo* that they were applicable.

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[139] "The start of the restoration period will be considered the point in time when 1) field personnel are able to be dispatched without unacceptable safety risks from continued severe weather conditions (where adverse weather conditions are applicable), and 2) when the potential additional damage to the electric system from a storm would be low in proportion to the expected level of damage already sustained. The start of the restoration period may be different for specific, local areas where the effect of a storm limits access to facilities (*e.g.*, severe flooding)" (Con Edison 2019 ERP, Attachment 13 at 242 of 385.

[140] DPS-005(5).

D. Con Edison Substantially Complied with the ONIM Requirements

The ONIM Order requires the Company to make certain communications within a defined time after specific outage and system impact "triggers" occur.[141] The Order alleges four ONIM violations, stating that Con Edison failed to comply with the ONIM's timing and content requirements for both municipal and media communications. The Order, however, contains no specific allegations. Instead, it states that Con Edison presented "no evidence" of compliance with the ONIM requirements without detailing any specific failings. The Company filed its Report on Outage Notification Incentive Mechanism Performance for the July 21, 2019 Customer Outages, on September 23, 2019 ("ONIM Report").[142] In its ONIM Report, Con Edison followed the same format and included similar content that has been included in prior ONIM reports. As a result, the Order incorrectly alleges that the Company "presented no evidence."

The specific provision applicable to the Brooklyn Outage is the one that prescribes requirements after there has been an outage affecting 40,000 or more customers lasting two or more hours. For the Brooklyn Outage the ONIM was *formally* triggered at 9:38 p.m. on July 21. According to the Order, from that point, the Company had two hours to complete all communications activities,[143] and could not have formally complied with the requirements before

[141] ONIM Order, Attachment A, Section II. The ONIM has different requirements depending on the number of customer outages (more than 20,000, more than 40,000, or more than 70,000) and whether the outages are in a load area served by a single substation or in multiple load areas.

[142] Case 16-E-0060 – Consolidated Edison Company of New York, Inc. *Report on Outage Notification Incentive Mechanism Performance for the July 21, 2019 Customer Outages*, September 23, 2019.

[143] The ONIM Order grants the Company an additional two hours to comply when outages occur during non-business hours, as occurred here. The Order alleges that the two-hour adder does not apply "on the grounds that the outage was likely to have occurred based on the Company's past experience" (Order at 26, fn. 58) and that the applicable deadline is 11:38 p.m. The Company disagrees. The Order does not demonstrate that under similar conditions there have been 20,000 or more customer outages. In any event, Con Edison complied with the ONIM before either deadline.

9:38 pm. even though the major event occurred approximately two hours before. Because, however, the main event was the de-energization of the 4 kV grid, which the Company expected to produce outages lasting more than two hours, it began and completed all of the requisite activities prior to what the Order identifies as the formal trigger. Given that, at worst, the Company pro-actively complied with the ONIM requirements, and no revenue adjustment is justified.[144]

First, as explained in Con Edison's ONIM Report, Con Edison notified the Department about the Brooklyn outages at 7:56 p.m. through a report in the Department's Electric Incident Reporting System and at 7:59 p.m. through a phone call with the Department's designated nighttime representative.[145] The Company also made email and phone notifications to New York City Emergency Management at 7:54 p.m.[146] In addition to these formal ONIM notifications, senior company officials communicated informally with senior representatives from the City and the Department. Moreover, New York City Emergency Management had an employee at Con Edison's CERC when the Company implemented its decision to de-energize the 4 kV grid.

As stated above, these notifications should not be disregarded because they occurred before the ONIM was formally triggered; the Company's communications satisfied the ONIM's purpose and provided the Department and the City with information as early as practicable with respect to the major event that occurred that evening, the de-energization of the 4 kV grid at 7:32 p.m. It would be unreasonable and elevate form over substance to now state that the Company

[144] Indeed, it would make more sense if, going forward, the Commission made it clear that Con Edison can commence and comply with all ONIM requirements as soon its makes a reasonable determination that there are more than 40,000 outages that are likely to last more than two hours or other thresholds under the ONIM.

[145] ONIM Report at 3.

[146] *Id.* at 4.

should have delayed communications in order to avoid an ONIM revenue adjustment. Moreover, requiring the Company to repeat notifications would be an inefficient use of Company resources during a major event.

Second, the Company notified the Department and New York City Emergency Management about the cause of the outages, the geographic area affected, and the estimated number of customers affected. ETRs were not applicable because the ONIM provides that ETRs are necessary only when available and they were not available for the notification.[147] Since the Company's notifications were immediate, estimated time of restoration was not available.[148] Under the circumstances, the Company complied with the ONIM's content requirements for communications with governmental emergency response agencies.

Third, the Company issued a press release at 8:30 p.m.[149] Similar to the Company's communications with the Department and New York City Emergency Management, Con Edison issued this press release prior to the ONIM formal time frames. Immediately issuing a press release benefited customers and other stakeholders because it let them know that the Company was aware of and responding to the outages.

In the 8:30 p.m. press release, Con Edison provided the estimated number of customers out of service and the geographic area impacted,[150] which are the only ONIM requirements for press releases.[151] With this press release, Con Edison met the ONIM requirements for media

[147] *Id*. at 3-4.

[148] ONIM Order, Attachment A, Section IV(2).

[149] ONIM Report at 6.

[150] *Id.* at 6.

[151] ONIM Order, Attachment A, Section IV(6).

notification content. [152]

Based on the information in Con Edison's ONIM Report, and the information provided here, there should be no question that Con Edison either complied or substantially complied with the ONIM requirements for timing and explicitly complied with the ONIM requirements for content for both municipal and media notifications. There is no basis for any revenue adjustments for this event.

III. CONCLUSION

Wherefore, for the reasons set forth above, Con Edison respectfully requests that the Commission: (1) decline to commence a penalty proceeding or a prudence action against the Company; (2) decline to hold a hearing; (3) determine that ONIM revenue adjustments are not appropriate; and (4) terminate this proceeding.[153]

[152] The Company issued its next press release at 11:00 p.m. because it had additional information to relay to customers. This press release also contained the geographic area and estimated number of customers affected by the outage and occurred within the strict four-hour window permitted by the ONIM for media notifications. The 8:30 p.m. and 11:30 p.m. press releases were provided to the Department during its investigation. DPS004(2), Attachment 1.

[153] The Order states that after Con Edison "has submitted its response to this Order, the Commission directs the Department to hold a hearing to demonstrate why any proposed penalty or penalties under PSL§25a should be assessed against Con Edison." Order at 32. But, with respect to prudence, the Order correctly states that after receiving Con Edison's response as to "why the Commission should not initiate a prudence proceeding," that the Commission "may direct a focused proceeding." The Company submits that the Commission should act in accordance with Ordering Clause 1 at 33, which states that it is for the Commission, and only the Commission, to determine, after receiving Con Edison's response to the allegations, whether to commence a penalty or prudence action. The Commission should therefore further review the penalty related allegations and the Company's response before determining whether it is appropriate to hold a hearing on a penalty.

Dated: December 21, 2020

Respectfully submitted,

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