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Phone: (212) 885-5150
Fax: (917) 332-3030
Email: MMitzner@BlankRome.com

June 18, 2007

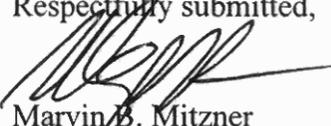
VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

The Honorable William Bouteiller
Administrative Law Judge
New York Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Case 06-T0710 – Application of Consolidated Edison Company of New York, Inc., for a Certificate of Environmental Compatibility and Public Need under Article VII of the New York State Public Service Law for the M29 Transmission Line Project

Dear Judge Bouteiller:

Hereby submitted for filing in the above-referenced proceeding is the Brief on Exceptions of Time Warner Cable of New York City. In accordance with 16 NYCRR §4.10 and the Notice of Schedule for Filing Exceptions dated May 30, 2007, an original and twenty copies of the Brief are being submitted to Secretary Brilling via overnight delivery. The Brief is also being served on all parties to this proceeding via electronic mail.

Respectfully submitted,

Marvin B. Mitzner

Enclosures

cc: **Jaclyn A. Brilling, Secretary (Via Federal Express w/enclosures)**
All Active Parties (Via Electronic Mail w/enclosures)

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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IN THE MATTER of

Hon. William Boutellier
Administrative Law Judge

Application of Consolidated Edison Company of :
New York, Inc. for a Certificate of Environmental :
Compatibility and Public Need Pursuant to Article :
VII of the Public Service Law for the M29 :
Transmission Line Project, New York, Bronx, and :
Westchester Counties, New York :

CASE NO.: 06-T-0710

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**BRIEF ON EXCEPTIONS OF
TIME WARNER NY CABLE D/B/A TIME WARNER CABLE OF NEW YORK CITY**

I.

STATEMENT OF THE CASE

Consolidated Edison Company of New York, Inc. ("Con Ed") has proposed to construct a 345 kV transmission line from the Sprain Brook Substation in the City of Yonkers to a new substation to be built in upper Manhattan. The vast majority of the transmission line will be built underground and will pass through the City of Yonkers and Counties of Westchester, Bronx and New York. With respect to the portions of the transmission line that will pass through upper Manhattan, Con Ed proposed to enter Manhattan under property owned by The New York and Presbyterian Hospital ("NYPH"), and continue south on Ninth Avenue, parallel to and bordering property owned and operated by Time Warner NY Cable d/b/a Time Warner Cable of New York City ("Time Warner"), before turning west onto West 219th Street.

However, the route, as proposed by Con Ed, gave rise to several concerns on behalf of Time Warner. These concerns, in particular, are as follows: 1) the soil and

groundwater under the Ninth Avenue sidewalk have known, significant levels of petroleum contamination, confirmed by Con Ed's own consultants and engineers, due to its former use as the Belcher-River Oil Terminal; 2) an elementary and intermediate public school, PS/IS 278¹ is located on West 219th Street with an entrance on Ninth Avenue where school buses park to drop off and pick up school children; and 3) Time Warner has three business operations along the Con Ed Route that would be significantly and adversely impacted by the excavation, trenching and manhole construction related to the transmission line.

As a result, Time Warner proposed an alternate route (the "TWC Alternate") which utilizes a similar construction approach and maintains the critical curvature of the transmission line that is reflected in the Con Ed Route, thus assuring its feasibility. The TWC Alternate would construct the line from the tunnel shaft proposed for the route preferred by Con Ed on the Manhattan side of the Harlem River to a manhole located north of the Time Warner property near the intersection with West 220th Street, then curve across Ninth Avenue and travel west on West 220th Street. The TWC Alternate would then curve southward south of the intersection of West 220th Street and Broadway. The TWC Alternate's route onto West 220th Street would follow a similar curvature as the curvature shown for the Con Ed Route onto West 219th Street. The TWC Alternate merely relocates the transmission connection between Broadway and Ninth Avenue from West 219th Street to West 220th Street. The key difference is that the TWC Alternate virtually eliminates all of the serious concerns and problems related to school safety, traffic disruption, environmental and health exposure risks, and adverse impacts to Time Warner's business operations caused by the Con Ed Route.

¹ PS/IS 278 consists of two school buildings. The intermediate school building is located on the northeast corner of West 219th Street and Broadway and the elementary school building is located on the southwest corner of Ninth Avenue and West 220th Street.

Con Ed filed its application for a certificate of environmental compatibility and public need, pursuant to Public Service Law Article VII on June 14, 2006. Con Ed supplemented its Article VII application in August, 2006. In connection with Con Ed's Article VII application, evidentiary hearings were held from January 22 through January 25, 2007, and on March 19, 2007. Following a briefing period, a Recommended Decision was rendered by the Honorable William Bouteiller, A.L.J., on May 29, 2007 (the "Recommended Decision").

The Recommended Decision provided that "the Commission can find that the proposed transmission facility is needed and is in keeping with the State's plans for the delivery of electricity in the greater New York City metropolitan area." *See* Recommended Decision at 57. Furthermore, Judge Bouteiller held that "construction of the transmission facility on West 220th Street cannot be ruled out by the record information. At most, Consolidated Edison has established that it has not studied the use of West 220th Street as closely as it has studied West 219th Street." *See* Recommended Decision at 64. "Consolidated Edison's lack of familiarity with a reasonable alternative presented by another party does not provide sufficient grounds to rule the alternative out of the running." *See id.* (emphasis supplied). Judge Bouteiller concluded that because "the use of either street [West 219th or West 220th] appears to viable at this stage of the proceedings" ... "the most salient question is whether the placement of the transmission facility on one street or the other produces unacceptable impacts, or major inconveniences, for either of the two entities involved." *See* Recommended Decision at 65.

Of greatest significance is that Judge Boutellier stated that he would "recommend the alternative route segment presented by Time Warner" upon a demonstration that the use of West 220th Street does not conflict with the entrance to the NYPH's Allen Pavilion. *See* Recommended Decision at 65.

II.

USE OF THE TWC ALTERNATE ALONG WEST 220TH STREET WILL MINIMIZE IMPACTS AND NEITHER CONFLICT NOR IMPAIR ACCESS TO THE ALLEN PAVILION

Time Warner believes that construction of the transmission line along West 220th Street will result in less impacts and inconveniences as compared to the Con Ed preferred route, which runs west along West 219th Street. As already discussed, the TWC Alternate, utilizing West 220th Street in lieu of West 219th Street, will minimize or eliminate Time Warner's concerns about potential contamination exposure and associated health risks, school safety, and disruption of traffic and its business operations.²

While NYPH alleges that access to its Allen Pavilion would be impeded if the transmission facility was located on West 220th Street because the only entrance is located at the intersection of Broadway and West 220th Street (*see* Recommended Decision at 36), no traffic studies were conducted. There is no reason to believe that the entrance or exit to the Allen Pavilion would be significantly impacted by construction on West 220th Street. We present the following to demonstrate that the entrance to the Allen Pavilion would not be compromised and in support of Judge Boutellier's recommendation favoring the TWC Alternate.

The orientation of the entrance to the Allen Pavilion, the location of the steel columns that support the elevated subway tracks, and the curvature of the route of the transmission line, all combine to permit a route that avoids the entrance to the Allen Pavilion.

² We note that Department of Public Service ("DPS") Staff incorrectly assumed that West 220th Street was a narrower street as compared to West 219th Street. *See* Recommended Decision at 37. There is no truth to this allegation as the New York City Land Map, or a measurement of the respective street widths, demonstrates that West 219th Street is the same exact width as West 220th Street. Accordingly, this assertion made by DPS Staff should be given no merit and disregarded by the Public Service Commission.

Con Ed's preferred route would curve the transmission line from West 219th Street south onto Broadway. A column support for the elevated subway tracks is situated in the middle of the intersection of West 219th Street and Broadway (see Photo 1 annexed hereto³). To clear the column and its supporting structure, the transmission line must turn at a more obtuse angle and traverse Broadway south of the column.

If a similar curvature of the line onto Broadway is applied to West 220th Street and traverses south of the support column located at that intersection (see Photo 2 annexed hereto), the transmission line would run well south of the entrance to the Allen Pavilion. The line would approach a location approximately opposite the bus shelter on the west side of Broadway (see Photo 3 annexed hereto). The area in front of the entrance to the Allen Pavilion would thus be avoided.

Moreover, the width of Broadway in the vicinity of the Allen Pavilion can be occupied by four cars for both north and south travel, even though the roadway is divided into two driving lanes and one parking lane in both directions. If the Public Service Commission adopted the TWC Alternate, construction would proceed along the northern parking lane on West 220th Street. The transmission trench would then proceed and cross Broadway following a similar curvature as proposed by Con Ed. By following such curvature, the transmission trench would occupy the easternmost driving lane on Broadway, leaving a wide driving lane and parking lane. If no parking was permitted on this portion of Broadway during the construction phase, two driving lanes would be available, including the lane adjacent to and south of the Allen Pavilion entrance/exit. In fact, construction along West 220th Street would not block any traffic lanes adjacent to this entrance. NYPH's assertions (and those joined by Con Ed) that

³ This photo and the others annexed to the brief are taken from Google maps and are presented to aid in the depiction and characterization of the observed condition at the sites.

construction work opposite the Allen Pavilion's entrance would disrupt access is mere speculation and should not be afforded any weight in determining the transmission facility's location.

NYPH's position regarding any impact of the TWC Alternate upon the entrance to the Allen Pavilion must be placed in context with NYPH's own presentment of evidence and testimony supporting an alternate route which would run along Broadway across the entire length of the Allen Pavilion frontage on Broadway.⁴ The alternate route proposed by NYPH would require placing the transmission line and construction activity directly in front of the entrance to the Allen Pavilion of the NYPH (see Exhibit 14 of the evidentiary proceeding, annexed hereto and labeled exhibit MI-3A). *See* NYPH witness, Martin Izaak, Tr. at 1241:3-1243:11.⁵ Yet, NYPH has voiced objection to the TWC Alternate. It should be evident that if construction in the vicinity of this entrance were detrimental, NYPH representatives would never have developed and supported an alternate route that passed directly in front of the same entrance. In contrast, the TWC Alternate proposes a route which would travel west along West 220th Street curving southward from the east side of the southbound lanes of Broadway to

⁴ The Recommended Decision, while noting that NYPH presented alternate routes which it later withdrew in favor the DPS Staff proposal, fails to identify the specifics of the one alternate route that NYPH promoted prior to DPS Staff proposing its alternate route. The NYPH alternate route described herein is no less significant (in fact, it is more so) than the other multiple alternatives proposed by Con Ed that it withdrew (*see* Recommended Decision at 42). It is also unclear whether, in the absence of the DPS Staff proposal, NYPH would have withdrawn its alternate route. We, therefore, believe the Recommended Decision should have contained a description of the NYPH proposal noted herein.

⁵ While NYPH proposed several alternate routes, during the evidentiary hearings, NYPH withdrew all of its proposed alternates, save for one. *See* NYPH Izaak, Tr. at 1277:6-82. The remaining NYPH alternate proposed installing the vertical shaft and manhole at a location on Ninth Avenue near Broadway. *See* NYPH Izaak, Tr. at 1242:5-12. NYPH proposed that the route would then turn on to Broadway, north of the Allen Pavilion, and then continue south along Broadway, directly in front of the entrance to the Allen Pavilion, until it intersected with Con Ed's preferred route at West 219th Street and Broadway. *See id.*

connect with the remainder of Con Ed's preferred route on Broadway south of the intersection of Broadway and West 220th Street. This would keep construction well south of and across Broadway from the entrance to the Allen Pavilion of the NYPH.

Further, even were there some unforeseen inconvenience resulting from the TWC Alternate, the Allen Pavilion would be in no worse situation than any other hospital or emergency service provider along any other portion of Con Ed's preferred route. In the context of these proceedings, Con Ed has indicated that it has substantial experience in constructing transmission lines in the vicinity of hospitals and other essential emergency services, such as firehouses and police stations. *See* CE⁶ Chu, Tr. at 274:16-275:4 (explaining how access to firehouse entrances along the construction route will be maintained), 276:2-10 ("The way we do construction within critical facilities we are in constant contact with the municipalities and we work with these folks or municipalities to minimize any disruption to their operation ..."); CE Beccalori, Tr. at 848:21-24 (Con Ed construction has "never affected any emergency services, either fire, police or hospital."), 850:23-851:3 (Con Ed has been "very successful" dealing with construction in front of emergency services), 854:16-20 (Con Ed construction has not affected any emergency services response time).

Con Ed has ensured that the delivery of emergency services, their access to roads, and their ability to respond to the public will not be impeded. *See* Recommended Decision at 31-32; *see also* CE Beccalori, Tr. at 845:5-20 (Con Ed's standard operating procedure is to meet with every hospital ahead of time to mitigate any potential problems). Certainly, the NYPH's Allen Pavilion will not be the only hospital or emergency service near the route to be certified by the Public Service Commission. *See* CE Dempsey, Tr. at 334:15-335:11 (25% of the City of

⁶ Citations to the testimony of Time Warner witnesses will be referred to herein as "TW" and citations to the testimony of Con Ed witnesses will be referred to as "CE".

Yonkers firehouses and almost 60% of its emergency response area are located along Con Ed's preferred route); City of Yonkers Deputy Fire Chief William Fitzpatrick, Tr. at 669:9-15.

Con Ed's preferred route proposes to construct the transmission line across West 219th Street and then curve south down Broadway. The TWC Alternate merely substitutes West 220th Street in place of West 219th Street. This difference of one block will cause no disparate impediments to access to the entrance to the Allen Pavilion and NYPH's facilities. The geography of this area confirms that belief given that the majority of the residential and commercial population in this area is located south and west of the intersection of West 220th Street and Broadway. That is, the vast majority of traffic heading to the Allen Pavilion entrance will have to deal with the construction of the M29 Transmission Line in the same exact manner, whether the actual construction occurs on West 220th Street (the TWC Alternate) or West 219th Street (Con Ed's preferred route). Regardless of whether the route turns west on West 219th Street or West 220th Street, Broadway will be substantially utilized for the transmission facility route in the vicinity of NYPH's Allen Pavilion.

III.

OTHER EXCEPTIONS TO THE RECOMMENDED DECISION

1. Objections Raised Concerning the Car Wash Should Be Ignored

DPS Staff and Con Ed allege that the TWC Alternate, if adopted, would adversely affect the business of a car wash located at the corner of West 220th Street and Broadway. *See* Recommended Decision at 37. However, there is no reason to believe that the business of the car wash would be "severely affected" if the TWC Alternate was adopted. *See* DPS witness, David Macks, Tr. at 1447:10-1448:12. The queuing of cars on the south side of West 220th Street would not be significantly affected by construction on the north side of West 220th Street.

Moreover, since West 220th Street and West 219th Street are identical in width, travel lanes in both directions can be maintained. Of great significance is that no representative of this car wash has come forward at any point in these proceedings to object to any of the routes proposed by any of the active parties despite more than sufficient notice of public hearings and the opportunity by Con Ed and others to solicit participation by the car wash. In fact, Con Ed's witnesses have testified that Con Ed has not even spoken to any representative of the car wash or any representative for any of the business entities located along the stretch of Broadway where Con Ed has proposed its route. *See* CE Mooney, Tr. at 522:15-523:11.

2. **Contamination Along Ninth Avenue is Not Minor and Non-Hazardous**

The Recommended Decision also states that the subsurface environmental testing conducted by Con Ed along Ninth Avenue showed that the amount of contamination was "minor and non-hazardous." *See* Recommended Decision at 37. This holding does not accurately reflect the testimony adduced during the evidentiary hearings and must be supplemented. Con Ed's own environmental experts have acknowledged and admitted that organic vapors concentrations in a trench, at the levels found along Ninth Avenue at 219th Street, should be considered a safety hazard or safety condition. *See* CE Fleming, Tr. at 1378:12-25; *see also* TW Frisina, Bohms, Ernst, Tr. at 929:18-930:2 ("Strong petroleum odors and elevated PID readings were noted in soil samples from borings M-28 at 5 to 9 feet and 9 to 13 feet below grade, from M-29 at 5 to 8 feet and 8 to 12 feet below grade, and from M-30 at 8 to 12 feet below grade"); 930:4-6 (based on the September 2006 Report prepared by Fleming-Lee Shue, Inc. for Con Ed, 1/8th inch of petroleum product was measured in the temporary well points in borings M-29 and M-30 and a slight petroleum sheen was also observed in M-28 during well point sampling with petroleum-related contaminants, including fuel oil, kerosene and constituents found in gasoline,

were found in soil and groundwater.) (emphasis added). Time Warner raises this exception because the environmental impacts of this contamination remain unknown.

3. Construction of the Manhole Requires Excavation Greater Than Five Feet Wide and Eight Feet Deep

The Recommended Decision notes that construction of the proposed route requires an excavation up to five feet wide and eight feet deep. *See* Recommended Decision at 3. However, these figures are not accurate for the entirety of the construction of Con Ed's proposed route. According to Con Ed's own experts, the manhole dimensions are 22 feet long by 9 feet wide by 9 feet deep so that the trench for the manhole would reach a depth of 10 to 11 feet. *See* CE Chu, Tr. at 577:18-21.

4. Con Ed Has Not Identified All Environmental Impacts

In addition to the potential impacts from the contamination found along Ninth Avenue as part of Con Ed's proposed route, Con Ed has not identified or analyzed the environmental impacts associated with its construction and operate of the new Academy Substation. According to Community Board 12, the site of this new substation should be considered a "brown field" because a power generation station previously operated at this location. *See* Recommended Decision at 54. Because of this prior use, Community Board 12 has raised concerns about the safe removal of ground material and soil that might be contaminated. *See id.* Considering that Con Ed has not discussed its intentions to safely identify and remove the potentially contaminated materials and soil at this location, Time Warner takes exception to the statements that Con Ed "has identified the environmental impacts associated with the proposed transmission facility" and that Con Ed "has explained its efforts to keep adverse environmental impacts to a minimum." *See* Recommended Decision at 21.

Because the environmental impacts for the area of known contamination along Ninth Avenue and the location of the new Academy Substation are unknown the Public Service Commission cannot find that the probable environmental impacts are known or that the transmission facility represents the minimum adverse impacts to the natural environment as suggested by the Recommended Decision. *See Recommended Decision at 58.*

CONCLUSION

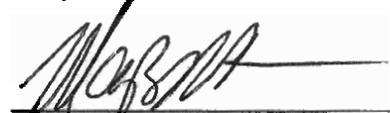
For the foregoing reasons, the TWC Alternate should be adopted because the use of West 220th Street does conflict with the entrance to the NYPH's Allen Pavilion nor does it produce unacceptable impacts or major inconveniences to NYPH and Time Warner.

Furthermore, the other exceptions raised by Time Warner should be accepted after a review of the testimony submitted during the evidentiary hearings held in connection with this proceeding.

Dated: New York, New York
June 18, 2007

Respectfully submitted,

By:



Marvin B. Mitzner, Esq.
BLANK ROME LLP
405 Lexington Avenue
New York, New York 10174
(212) 885-5150

-and-

Scott M. Kessler, Esq.
COZEN O'CONNOR
909 Third Avenue, 17th Floor
New York, New York 10022
(212) 509-9400



PHOTO 1 – Looking east on W. 220th Street and Broadway (US9)

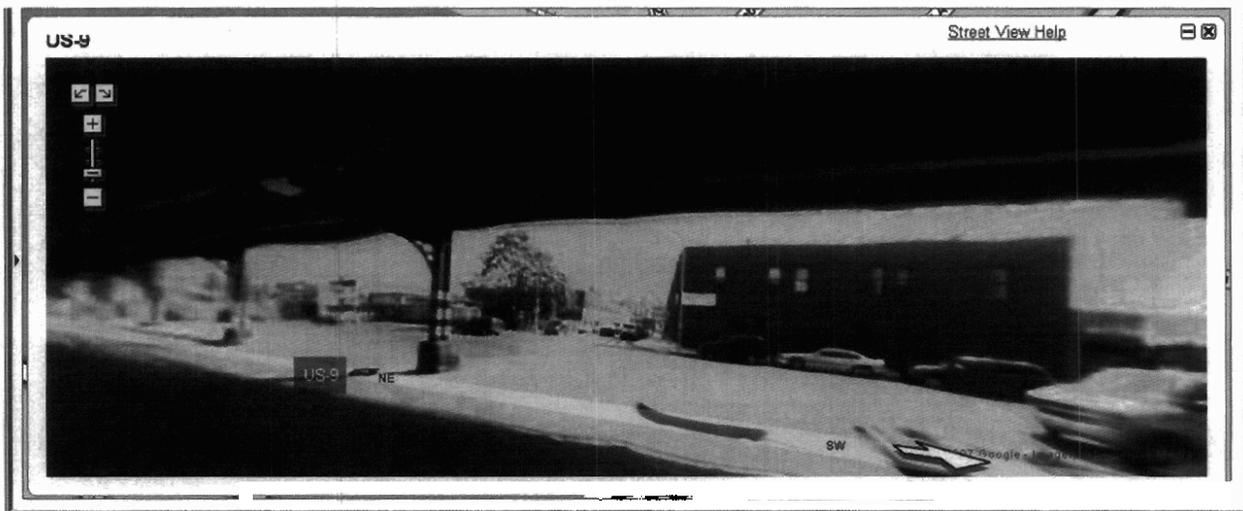


PHOTO 2 – Looking east on W. 219th Street and Broadway (US9)



PHOTO 3 – Looking west on W. 220th Street and Broadway (US9)

Exhibit No. (MI - 3A)

