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May 8, 2007

**VIA E-MAIL AND OVERNIGHT MAIL**

Hon. William Bouteiller  
New York State Department  
of Public Service  
Three Empire State Plaza  
Albany, NY 12223-1350

**Re: Case 06-T-0710 – Consolidated Edison Company of New York, Inc.**

Dear Judge Bouteiller:

In compliance with the schedule established in your ruling issued March 20, 2007, Con Edison is submitting its Reply Brief in this proceeding. Concurrently, and in accordance with Department regulations at 16 NYCRR § 4.8(d), Con Edison is also providing electronically a copy of the brief to each of the parties on the current Active Party List, and 25 copies to the Department's Secretary.

Respectfully submitted,

Enclosure

cc: Active Party List (2/27/07) (via e-mail)  
Hon. Jaclyn A. Brillling



**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

CASE 06-T-0710 - 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 in Westchester, Bronx, and New York  
Counties.

**REPLY BRIEF OF APPLICANT  
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.**

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## I. PRELIMINARY STATEMENT

On April 24, 2007, Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Applicant") received an initial brief from Department of Public Service Staff ("DPS Staff") supporting the issuance of a Certificate of Environmental Compatibility and Public Need ("Certificate") for the construction and operation of the M29 Transmission Line Project (the "Project"). On the same date, Con Edison also received briefs from other active parties, including the City of Yonkers; the County of Westchester; members of the Joint M29 Monitoring Committee (the "Joint Committee"), including its Bronx members (the "Bronx Members"), Manhattan Borough President's Office ("MBPO"), and Manhattan Community Board 12 ("CB12"); Time Warner Cable ("TWC"); and the New York and Presbyterian Hospital ("NYPH"). These briefs took a variety of positions, opposing the Project route in full or in part, or accepting the route contingent upon specified conditions. Con Edison respectfully submits this reply brief in response to these briefs.<sup>1</sup>

The City of Yonkers continues to express concerns with temporary traffic, noise, and potential infrastructure impacts of Project construction within the city. The record shows that these concerns can and will be addressed adequately during Project construction.

Similarly, the initial briefs of the Bronx Members, MBPO, and CB12 also reflect concerns about Project impacts. Here, too, the evidentiary record demonstrates that these concerns can and will be addressed adequately during construction. The MBPO initial brief contends that Con Edison has not sufficiently studied the impact of stray current along its preferred route in Manhattan, but then endorses an alternative route that would only exacerbate those concerns over a greater distance in a more environmentally sensitive

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<sup>1</sup> On April 26, 2007, Con Edison filed with the Presiding Officer a motion to strike extra-record and confidential materials included in the briefs of MBPO and NYPH. A decision on that motion is pending.

location in the Bronx. Further, the CB12 and Bronx Members initial briefs raise for the first time issues with Con Edison's local electric system distribution infrastructure that are irrelevant to, and outside the scope of, this proceeding.

Attempting to avoid minor and temporary inconvenience to its business operations along Ninth Avenue and West 219<sup>th</sup> Street, TWC's initial brief proposes an alternative route based upon the false premise that Con Edison's proposed street trenching will expose "significant" subsurface environmental hazards. The evidentiary record clearly demonstrates otherwise, and further shows that the TWC alternative route along West 220<sup>th</sup> Street will simply transfer street construction impacts to a small business and local medical facility where that inconvenience, although temporary, has the potential for greater impacts on those facilities' operations.

Finally, NYPH calls upon the Commission to intrude into ongoing negotiations between NYPH and Con Edison regarding the easements Con Edison needs for this Project, and to dictate to Con Edison the terms and conditions, including a transfer of Con Edison's property, for the grant of such easements. As detailed below, there is no basis for such action, which is outside the Commission's jurisdiction.<sup>2</sup>

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<sup>2</sup> Although the DPS Staff initial brief gives conditional support to its FCUA-1 Alternative as "a viable option for minimizing adverse environmental impacts, assuming the benefits provided under this option outweigh the potential disadvantages," the evidentiary record indicates otherwise and Con Edison will not reiterate the significant and legitimate concerns it raised with this alternative at pp. 38-42 of its initial brief. Additionally, in light of the arguments made in Section III of the DPS Staff initial brief, and assuming the Commission concurs with this statutory interpretation, Con Edison withdraws its request for waivers of the specified City of Yonkers procedural rules set forth in the Application, as amended.

Con Edison also does not contest the representations it made that are cited in the County of Westchester's initial brief. It is inappropriate, however, for these detailed representations to be included as Certificate conditions. Rather, Con Edison intends to memorialize them in the Project EM&CP with respect to transmission line construction in Westchester County. The County will have ample opportunity to comment to the Commission on the proposed Project EM&CP if it believes the EM&CP does not satisfactorily address those representations

## II. ARGUMENT

### A. THE RECORD SHOWS THAT THE CITY OF YONKERS' CONCERNS CAN AND WILL BE ADDRESSED ADEQUATELY DURING CONSTRUCTION

The City of Yonkers continues to fault Con Edison for not conducting noise or traffic impact studies along the preferred route and for not having detailed knowledge at this juncture in the Article VII process about specific school locations, bus routes, or specific development projects along the proposed construction corridor.<sup>3</sup> But Yonkers' criticism devolves from a faulty understanding of the Article VII process, which first sets general conditions on construction and process, notifications, environmental supervision and controls in an Article VII certificate, and establishes detailed environmental and construction protocols through the subsequent development and implementation of an EM&CP in support of that certificate.<sup>4</sup>

The City of Yonkers continues to express concerns about construction impacts along the preferred route.<sup>5</sup> The record shows that these concerns can and will be addressed adequately during Project construction. As explained in detail in its initial brief at pp. 15-22, Con Edison has had decades of experience in street construction in the Cities of New York and Yonkers and elsewhere in Westchester County. As explained by Mr. Beccalori, this

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<sup>3</sup> Interestingly, the City of Yonkers' initial brief devotes not one word to its I-87 alternative route, despite its offer of testimony in support of that route during the evidentiary hearings. Consequently, the Commission should appropriately assume that Yonkers has abandoned its proposed alternative.

<sup>4</sup> Yonkers' traffic concerns appear also to derive from a misunderstanding of Con Edison's cable installation process. The Yonkers' Initial Brief (at p. 10) implies that Con Edison will need an area of approximately 450 feet by 25 feet wide for up to a month for positioning cable, and that Con Edison inaccurately contends this work can be conducted during off-peak hours. But Yonkers has confused cable pulling with cable splicing. *Pulling* a cable section is generally done during a single night shift. *Splicing* takes longer, but is confined to a minimal area around each manhole where a splicing trailer is located. For splicing, a lane closure would only be required for a short distance, not the 450 foot length suggested in the Yonkers' brief.

<sup>5</sup> Although Yonkers is most critical of Con Edison for not conducting a traffic impact analysis in support of its assessment that traffic impacts will be minimized along the preferred route, Yonkers goes a step further and claims in its initial brief that Con Edison's preferred route "would cause severe traffic impacts" within the City of Yonkers. No quantitative traffic impact analysis was submitted in support of that claim.

project is no more challenging than hundreds of other street construction projects that Con Edison has undertaken. Indeed, DPS Staff witness Strub testified to his personal oversight of two recent Con Edison Article VII projects in Westchester County aggregating approximately seven miles of street construction within the Towns of Mount Pleasant and Greenburgh and between and within the Cities of New Rochelle and Mount Vernon on roads substantially similar to those proposed for use by Con Edison in the City of Yonkers. In both cases, Mr. Strub stated that there had been no issues with respect to construction on either of these projects and that no non-compliance reports for infractions had been written. Tr. 1467, lines 18-24. Mr. Strub further testified that Con Edison had “made every reasonable attempt” to address specific community concerns and complaints, which “satisfactorily addressed the concerns of the adjacent property owners.” Tr. 1468, lines 1-17.

As pointed out at length in Con Edison’s testimony and summarized in its initial brief, it is long-established Con Edison practice to coordinate street construction and the mitigation of traffic and noise impacts with local authorities and to coordinate construction times and special needs with schools, houses of worship, and other sensitive facilities before construction begins in the vicinity of those facilities. In the context of an Article VII project, these actions are taken during and in support of the implementation of a project EM&CP, and will be done so here. *See* Con Edison Initial Brief at 22-23.

Finally, Yonkers attempts to make much of its fragile infrastructure, contending that the Project will “inevitably” cause major interferences. But this is nothing more than mere speculation, with no basis in experience and is directly contradicted by Con Edison’s construction process and plans for this Project as described in its testimony. During cross-examination, the Yonkers’ witnesses testified that over the past ten years, the city had gone



through at least nine major infrastructure projects on its streets. Yet the only real difficulty arising from this construction and repair work, which in one case extended to a depth of nine feet, was traffic control – successfully managed and mitigated through night construction, daytime work restrictions, and a police presence. When asked, the Yonkers witnesses could not cite one instance where this street construction work itself had any detrimental impact on even the most sensitive existing infrastructure. Tr. 703-18, lines 24-23. Moreover, the completion of Con Edison test pitting in Yonkers will further ensure that no unnecessary or major interference with existing infrastructure will occur. The results of test pitting will not alter the preferred route itself, but will inform decisionmaking on the need for any minor route deviations to avoid existing interferences and to establish a clear lane for feeder installation. Tr. 630, lines 5-16.

**B. THE ALTERNATIVE ROUTES FAVORED BY THE BRONX MEMBERS, MBPO, AND CB12 ARE NOT SUPPORTED BY THE RECORD**

The various groups comprising the Joint Committee continue to press for the I-87 alternative route for the Project despite clear and convincing evidence presented by Con Edison and the New York State Thruway Authority that this alternative is not viable from either a technical or regulatory perspective. Con Edison summarized this evidence in its initial brief at pp. 26-31, and will not belabor those points here.

Here, too, the Bronx Members' opposition to Con Edison's preferred route is seemingly compounded by a belief that Con Edison should have conducted and submitted detailed noise and traffic impact studies of its proposed route with its Article VII application, but Con Edison demonstrated in its initial brief that no such requirement exists. *See* Con Edison Initial Brief at pp. 17-18. Moreover, Con Edison demonstrated that it has already conducted extensive discussions with the New York City Department of Transportation

("NYCDOT"), which oversees street construction in New York City, and that NYCDOT has issued detailed pre-stipulations for Project construction in both the Bronx and Manhattan intended to minimize these temporary construction-related inconveniences. *See*, Con Edison Initial Brief at 16.<sup>6</sup>

The MBPO initial brief focuses in part on the potential impact of stray current on the underground portion of the Eighth Avenue subway line in Manhattan. By its own admission, MBPO acknowledges in its brief that the subway and preferred transmission line route would run parallel for about 1,360 feet, then suggests that the solution is to relocate the M29 route to the Bronx side of the Harlem River along the proposed FCUA-1 alternative route, where the M29 feeder would parallel Metro-North's Hudson rail line for more than one mile, almost *four times* the length required in Manhattan. In the evidentiary record, Con Edison has already responded to this proposal, noting the significant difference in the comparative lengths that the routes would parallel a rail line and the resultant differences in the potential for corrosion impacts along the length of the feeder. Tr. 1731-32, lines 6-12.

With respect to the MBPO argument that implementation of the FCUA-1 alternative would obviate the possibility of encountering unknown utility and subway interferences in Manhattan, Con Edison's witnesses were very clear during cross-examination that Con Edison had conducted an extensive and comprehensive underground survey of the upper Manhattan portion of the route to verify a clear lane for the Project. Tr. 513, lines 9-22.

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<sup>6</sup> The Bronx Members initial brief refers to a March 22, 2007 City of New York report on the July 2006 power outage in Queens to raise concerns about the contractors that Con Edison would engage to work on the Project. Con Edison's oversight of contractor work forces was never raised as an issue by the Bronx Members, either in pre-filed testimony or during the evidentiary hearings.

Lastly, Con Edison wishes to correct a litany of statements in CB12's initial brief that are clearly contrary to the evidentiary record.<sup>7</sup> CB12 suggests (at pp. 1 and 3 of its initial brief), for example, that the Joint Committee's alternative route "along the western edge of the Major Deegan Expressway" was endorsed by DPS Staff in its direct testimony and exhibits. Of course, no such endorsement was made. To the contrary, DPS Staff simply proposed that Con Edison consider a partial alternative route along the western edge of Metro-North's Hudson rail line, while still concluding that Con Edison's preferred route could also be certified under Article VII. Tr. 1438-39. CB12 also claims that Con Edison's preferred route "will pass under property owned by Time Warner Cable, which is contaminated." Again, the record demonstrates that CB12 is incorrect and makes clear that the proposed tunneling method completely bypasses and will not require the use of the contaminated TWC property in Manhattan.<sup>8</sup> Tr. 561-62, lines 23-4. Finally, in its initial brief, CB12 mischaracterizes the content of a December 19, 2006 CB12 resolution as commitments "initially agreed to" by Con Edison. In fact, Con Edison made no such commitments. The resolution is CB12's list of issues it wanted addressed during the negotiation of the Joint Proposal submitted by Con Edison and the New York State Department of Transportation,

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<sup>7</sup> CB12 is correct that it has not yet received an EMF analysis on the combined effects of Con Edison's existing Sherman Creek facilities and the proposed Academy Substation. Although this analysis is beyond the scope of information required for Project review and approval, Con Edison has no objection to the request and is developing a report, which will be provided to CB12 as soon as possible.

<sup>8</sup> CB12 also claims that "[h]ardly anything has been done by [Con Edison] to improve the existing infrastructure within its preferred route." Putting aside that this claim has no bearing on the issues presently before the Commission in this case, CB12's assertion could not be further from the truth. In fact, in a September 1, 2006 response to a series of questions put to Con Edison by CB12 that August, and placed into the case record by CB12 at the September 6, 2006 public statement hearing, Con Edison explained that since 1999 it had added or replaced almost 31 miles of cable in the Washington Heights-Inwood Network, increased the number of distribution feeders by almost 50 percent, installed or replaced hundreds of sections of primary cable, added 18 new transformers, and replaced 75. See Attachment to September 1, 2006 letter from John H. Banks, Con Edison, to Martin Collins, CB12, at pp. 2-3.

which CB12 declined to sign because of its continuing objection to Con Edison's preferred route.

**C. TWC HAS FAILED TO JUSTIFY ITS PROPOSED ALTERNATE ROUTE**

Con Edison believes that it has more than adequately rebutted TWC's proposed alternative routing onto West 220<sup>th</sup> Street in its initial brief, but it is worth reiterating that TWC's alternative is nothing more than a transparent effort, based upon a false premise, to avoid the temporary inconvenience of feeder construction in the vicinity of its business operations. TWC acknowledges in its initial brief that it "raised the spectre" of contamination in August 2006. The term "spectre" has never been more aptly used. Indeed TWC's concern with contamination is nothing more than an illusion, with no substance, designed to raise fears and deflect from its true objective. Despite TWC's characterization of the contamination as "significant," the evidentiary record clearly demonstrates that the soil contamination revealed by test borings on Ninth Avenue is minor and non-hazardous, below New York State Department of Environmental Conservation recommended soil cleanup levels for volatile organic compounds, and can and will be dealt with in the normal course of Con Edison's street construction process. *See* Con Edison Initial Brief at 35-36; *See also* H.Exh.7, "*Phase II Environmental Investigation Report*" (Fleming Lee Shue, September 2006) at 12-13. Moreover, TWC's concerns that Con Edison's construction will exacerbate contamination on its property along Ninth Avenue was belied by the testimony of Con Edison witnesses Fleming, who was responsible for the soil testing and analysis used by TWC at the hearings, and Beccalori, who will oversee feeder construction at that location. Tr. 1310, lines 2-8; Tr. 1342-44, lines 2-24.

Lastly, and as noted in Con Edison's initial brief at p. 36, despite TWC's assertion that even the short duration of Project construction would create "major disruptions" to its business operations, TWC has been totally non-responsive to an on-the-record request for information that would quantify that "major disruption" to its business and place it in the context of TWC's overall cable service payment revenue stream. Moreover, as discussed in DPS Staffs' testimony and in NYPH's initial brief, TWC's alternative route would simply shift these temporary construction impacts to a small business on West 220<sup>th</sup> Street and to the sole entrance to NYPH's Allen Pavilion. *See* Tr. 1447-48, lines 10-12; Tr. 1596, lines 13-15; NYPH Initial Brief at 22.

**D. THE COMMISSION SHOULD REJECT NYPH'S REQUEST THAT IT INTRUDE INTO PRIVATE PARTY NEGOTIATIONS REGARDING EASEMENTS REQUIRED FOR THIS TRANSMISSION LINE**

For more than ten months, Con Edison and NYPH have been negotiating the terms and conditions of the easements required by Con Edison on the Manhattan side of the Harlem River for the Project's tunnel crossing of that river. Con Edison has been unable to agree to NYPH's demands because it considers them unreasonable. NYPH now brings its "wish list" to this proceeding and asks that the Commission direct Con Edison to accept them. This proposal is not only fanciful, it is not within the Commission's authority, and should be rejected out-of-hand.

First, and most fundamentally, Public Service Law Article VII is concerned solely with the licensing of the construction and operation of major electric transmission facilities. PSL § 126.1. Article VII provides the Commission with authority neither to get embroiled in the negotiations over the terms of any easements between an Article VII applicant and a

private property owner, nor to resolve disputes or dictate the terms and conditions of property easements between an applicant and a private property owner.

This principle has been emphasized in at least two recent Commission proceedings, where, in discussing the scope of Article VII, the Commission stated that “[w]hile [Public Service Law] § 130 supplants other permitting procedures in Article VII cases, it does not supplant the need to obtain property rights from the State, if necessary. The [PSC] has the authority to issue a certificate authorizing construction and operation of the pipeline. It has no authority, express or implied, to grant land, easements, licenses, franchises, revocable consents to use real property, or any other kind of property or right to use property.” See Case 05-T-0089, Fortuna Energy, Inc., *“Order Requiring a Hearing and Extending the Time Required to Render a Decision Pursuant to Public Service Law § 121-a(7)a”* (issued and effective March 23, 2005); see also, Case 01-F-1276, TransGas Energy Systems LLC, *“Recommendation Concerning Further Proceedings”* (issued April 12, 2006).

The Commission’s own Article VII guidance makes clear that the Commission has no role in property acquisition or condemnation under Article VII, noting:

“Following the granting of a Certificate or the approval of any required EM&CP, the certificate holder – if it is a utility – may acquire any necessary rights-of-way not already obtained through a negotiated transaction. While condemnation is usually a last resort, the laws of New York State give utilities the authority to pursue such rights through the courts, but require that ‘just compensation’ be paid. Neither Department staff nor the Commission has any role or jurisdiction in condemnation proceedings.” See, *The Certification Review Process for Major Electric and Fuel Gas Transmission Facilities* at 16.

Consequently, in issuing a certificate, or approving an EM&CP, the Commission is authorized to determine whether a project should be constructed and operated, and the

route it should use<sup>9</sup>, and once those decisions are made, it is the applicant's responsibility to obtain any necessary rights-of-way it requires to complete the approved project.

NYPH takes its wishful thinking to new heights when it asks the Commission to take the unprecedented action of directing Con Edison to transfer its property to NYPH in mitigation of some alleged harm.<sup>10</sup> Dismissal of this unsupported, impermissible proposal does not require extended discussion.

Second, NYPH seeks to justify its proposed easement conditions by claiming that they are needed to avoid interference with its development plans for its parking lot property. NYPH claims in its initial brief that this property "has become the focus of the Hospital's development planning" and that continued uncertainty with respect to the specific dimensions and timeframes required for any permanent or construction easements on that property would keep its near-term development plans in a "state of limbo." Con Edison submits that there is nothing in the evidentiary record of this case to suggest that the Project has factored at all in NYPH's development plans for this property, *if such plans even exist*.

From the very inception of this proceeding, at the first procedural conference in early September 2006, NYPH has intimated that the Project had the potential to interfere with development of its parking lot property. But when the Presiding Officer requested "specific plans or documents that would show us time frames or types of facilities the hospital is planning to use for that property" or "any current status" of that development, NYPH failed to provide them. Tr. 67-68, lines 4-7.

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<sup>9</sup> To that end, Con Edison reiterates the request made in its initial brief, at pp. 32-33, that any Certificate issued should identify the route through the NYPH and Kingsbridge Associates properties.

<sup>10</sup> Given the Commission's statutory mandate to determine that a project minimizes "adverse environmental impact," it is difficult to understand how the forced transfer of Con Edison's fee parcel would mitigate the *environmental* impacts of the Project, although it would certainly have a positive impact on NYPH's *commercial* interests.

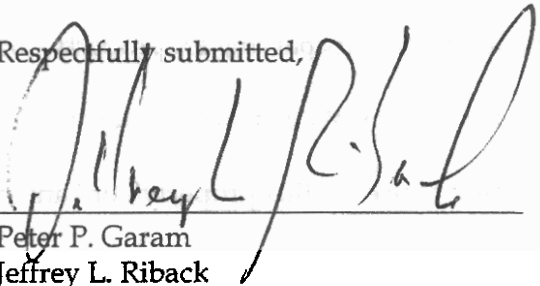
The Commission must, therefore, decline NYPH's invitation to establish the terms and conditions for the proposed easements on the NYPH parking lot property. If those private negotiations prove unsuccessful, New York State law provides the parties with the appropriate judicial process to acquire and value the private property Con Edison must have to construct the Project and meet the public need for power.

### III. CONCLUSION

For the foregoing reasons, Con Edison respectfully reiterates that the Project fully satisfies the statutory criteria set forth at PSL § 126.1 in support of a Commission finding that the Project, as proposed, is needed to enhance electric system reliability, minimizes adverse environmental impacts, and constitutes the best alternative for meeting the electric system need it is intended to address. Accordingly, Con Edison requests that the Commission (i) issue a Certificate of Environmental Compatibility and Public Need for the Project, and (ii) grant the informational waivers requested in the Applicant's June 13, 2006 motion accompanying the Application.

Dated: New York, New York  
May 8, 2007

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jeffrey L. Riback", is written over a horizontal line.

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