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Brief

May 8, 2007

VIA ELECTRONIC MAIL AND FED EX

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

Re: **Case 06-T-0710 - Application of Consolidated Edison Company
of New York, Inc. for a Certificate of Environmental
Compatibility and Public Need for the M29 Transmission
Line Project**

Dear Judge Bouteiller:

Enclosed for filing in the above-referenced proceeding is the Reply Brief of The New York and Presbyterian Hospital. In accordance with your March 20, 2007 Ruling and Section 4.8 of the Commission's Regulations, twenty-five copies of the Reply Brief are also being submitted to Secretary Brilling via overnight delivery and served on all parties to this proceeding via electronic mail.

Respectfully submitted,

Peter M. Metzger
Counsel to The New York and
Presbyterian Hospital

Encs.

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 : Before

Application of Consolidated Edison Company : Hon. William Bouteiller
of New York, Inc. for a Certificate of : Administrative Law Judge
Environmental Compatibility and Public :
Need Under Article VII of the New York : Case No.
State Public Service Law for the M29 :
Transmission Line Project : 06-T-0710
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***REPLY BRIEF OF
THE NEW YORK AND PRESBYTERIAN HOSPITAL***

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Dated: May 8, 2007

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***REPLY BRIEF OF
THE NEW YORK AND PRESBYTERIAN HOSPITAL***

INTRODUCTION¹

The New York and Presbyterian Hospital (the "Hospital") has reviewed the arguments advanced in Initial Briefs by the parties in this proceeding; with few exceptions, those parties raised no objections whatsoever to the conditions and requirements addressed by the Hospital on the record and in its Initial Brief. Nonetheless, the Hospital objects and will respond to certain matters raised by Consolidated Edison of New York, Inc. ("Con Edison") and Time Warner Cable in their Initial Briefs. In addition, this reply brief will address certain matters raised by Con Edison that offer additional confirmation of the reasonableness of the relief the Hospital seeks herein. Those matters are addressed below.

¹ The Hospital's Initial Brief is cited to herein as "NYPH IB at ____." Con Edison's Initial Brief is cited to herein as "CE IB at ____." Time Warner Cable's Initial Brief is cited to herein as "TWC IB at ____."

1. *Con Edison's Attempted Characterization of the Hospital's Request that the Commission Impose Certain Conditions in its Order Addressing the Extent of Con Edison's Permitted Use and Occupancy of the Hospital's Property as a "Negotiation of Private Property Rights" Misrepresents the Nature and Essential Purpose of the Article VII Process, as well as the Commission's Authority and Jurisdiction in this Proceeding*

Con Edison incorrectly asserts (CE IB at 33) that the Hospital's request that the Commission include certain requirements and conditions specifying the extent of Con Edison's use and occupancy of the Hospital's property as part of any order it may issue approving Con Edison's preferred route through the Hospital's property, would represent an improper "intervention" by the Commission in the "negotiation of private property rights . . . that would dictate the terms of an easement needed to construct the feeder."² Stated simply, Con Edison effectively asserts that the Commission is without authority to adopt any of the conditions and requirements recommended by the Hospital to govern the authorized extent and nature of Con Edison's permitted use and occupancy of property it seeks to acquire in connection with its project. In attempting to improperly circumscribe the Commission's authority, Con Edison does not contest the merits of any of the specific conditions or requirements recommended by the Hospital --- instead, without any statutory or case law support, Con Edison offers a blanket dismissal of any such specific conditions, effectively claiming that such conditions should be relegated to some other forum, where they "will be appropriately dealt with through negotiation, and failing negotiation, through condemnation." *Id.* at 33. No other party to this case has

² Those conditions and requirements were addressed on the record, and are set forth in the Hospital's Initial Brief at 7-9 and 10-21.

advanced such a novel and unprecedented position, or has otherwise objected to any of the conditions or requirements recommended by the Hospital. Con Edison's characterization of the requirements and conditions as interfering with a "negotiation of private property rights," and its related unsupported claim that the Commission lacks authority to impose conditions governing the nature and extent of the authorized use by an Article VII applicant of property acquired or to be acquired for its project, are each simply wrong.

The conditions and requirements that the Hospital has asked the Commission to include in any order authorizing the Con Edison preferred route through the Hospital's property have little or nothing to do with the negotiation of private easement terms. Rather, these conditions and requirements have everything to do with the actual extent and manner by which Con Edison's preferred transmission route is authorized to impact the Hospital's property (and the Hospital healthcare services and development planning for the property),³ and the need for the Commission to evaluate and determine such impacts, and to impose appropriate terms and conditions to reasonably mitigate, limit, and offset such impacts. The Commission's evaluation of these issues, and its adoption of necessary and appropriate conditions, requirements, and other mitigation measures, are not matters to be left to some private negotiation, or determination in some ancillary condemnation proceeding; rather they are the

³ No party has disputed the fact that the Hospital's property through and under which Con Edison proposes to route its transmission facility is the focus of the Hospital's current development plans to address the expanding health care needs of the community it serves in northern Manhattan and the Bronx. As explained in the Hospital's Initial Brief, it is critical to the Hospital that it maintain, to the maximum extent practicable, all of its rights in the surface and subsurface areas of the property that would otherwise be affected and impaired by Con Edison's proposed facilities so that the Hospital can proceed with its healthcare service programming and development planning efforts. NYPH IB at 3.

very core of the Commission's responsibilities and duties under Article VII. As is plainly stated in section 126(1) of the Public Service Law:

The commission shall render a decision upon the record either granting or denying the application as filed or granting it ***upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the commission may deem appropriate.***

(Emphasis supplied).⁴ Moreover, with regard to Con Edison's specific claim that the Commission's determination of the extent of the property Con Edison may acquire and impair, along with appropriate mitigation measures, represents an improper interference by the Commission in some unspecified negotiations, the Appellate Division, Third Department has stated that: "Clearly, a determination of the location and routing of a major utility transmission facility and, thus, the acquisition of lands or easements over lands, is within the jurisdiction of the PSC."⁵ Accordingly, Con Edison's misplaced efforts to obfuscate this critical issue by mischaracterizing the basis for the recommended conditions and requirements, and shrinking the authority and responsibility of the Commission, should be dismissed.

⁴ See also section 126(2) of the Public Service Law, which requires the Commission to evaluate the environmental impact of a proposed transmission facility -- ***evaluation of environmental impact includes consideration of whether the proposed route "... avoids disturbances to residential and commercial properties in densely populated areas."*** (Emphasis supplied). See, e.g., Case 04-T-1687, *Long Island Power Authority*, "Order Adopting The Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need," 2005 NY PUC LEXIS 466, 48-49 (Nov. 23, 2005).

⁵ *Simonds v. Power Authority of State of New York*, 64 A.D.2d 746, 748, 406 N.Y.S.2d 639, 641 (3rd Dep't 1978). Note, too, that the Hospital has ***not*** proposed that the Commission weigh in on actual easement terms, or issues pertaining to the ***valuation*** of the affected property.

2. *Con Edison's Revised Timetable for Facility Construction Underscores the Need for the Commission to Adopt the Conditions and Requirements Sought by the Hospital in its Initial Brief*

In the Addendum to its Initial Brief, Con Edison has revised its schedule for the Harlem River tunnel construction and the associated construction activity on the Hospital's property, stating: "The tunnel construction package is slated to begin in January 2008 and to be completed by December 2009. Cable installation and splicing in the tunnel will add approximately four months of work."⁶ In effect, under these revised schedule terms, it appears that Con Edison could be using the Hospital's property either as part of the tunnel and facility installation and/or for workspace and staging for a minimum of ***at least 27*** months, from January 2008 through April 2010. In addition, Con Edison now indicates that it estimates that other Con Edison Manhattan-side facility construction work would commence approximately October 2007 and end about October 2008, plus additional time that would be needed for restoration work.⁷ Although Con Edison has not yet revealed its position on this issue, it is very possible that it also will seek to obtain the use of the Hospital's Property for staging and workspace during all or a portion of such additional Manhattan side construction. Finally, Con Edison now also estimates that project construction will commence in September 2007, one month following the expected date of its receipt of a Commission order in this proceeding.⁸

⁶ See CE IB at 49-50

⁷ See CE IB at 49.

⁸ *Id.*

Under Con Edison's prior construction schedule, it estimated that the period of time to complete the tunnel construction and related facility installation would be 12-16 months.⁹ It also last stated that construction of the transmission facility would commence in February 2007 and terminate in March 2009.¹⁰ Hence, the time period allocated for tunnel construction and related work appears to have been extended by one year, the date for the commencement of construction has been pushed back 7 months and, for reasons not explained, the estimated date for completion of construction has been delayed **13 additional months to April 2010**. This revised schedule only exacerbates the Hospital's already serious concerns (NYPH IB at 2-5) regarding Con Edison's extended interference with development plans for this property, and underscores the significance and need for the Commission to either adopt Staff's alternate route proposal, which would take the proposed Con Edison facilities off the Hospital's property or, if the Commission does not select Staff's alternative route, the importance of the Commission adopting the conditions and requirements proposed by the Hospital to limit and mitigate such interference.

As the Hospital explained (*Id.* at 3):

The Hospital's Property through and under which Con Edison proposes to route its transmission facility currently is underutilized and thus has become a focus of the Hospital's development planning, in order to help the Hospital to respond to the expanding health care needs of the community and population it serves. *Id.* To that end, the Hospital has held discussions with a third party to consider development opportunities. **Consequently, the Hospital deems it critical that it maintain, to the maximum extent**

⁹ Ex. 1, Exhibit 1 – General Information Regarding Application at 1-2

¹⁰ *Id.*

practicable, all of its rights in the surface and subsurface areas of the property that would otherwise be affected and impaired by Con Edison's proposed facilities so that the Hospital can proceed with its healthcare service programming and development planning efforts.

(Citations omitted). In connection with its development plans, the Hospital also has made clear that one of the major impacts resulting from Con Edison's installation of its transmission facility on the Hospital's use and development of its property results from "***the uncertainty of the commencement and completion dates for the M29 Project and Con Edison's asserted need to use and occupy substantial portions of the Hospital's Property for temporary staging and workspace to complete its tunnel and facility installation work.***"

(Emphasis supplied). *Id.* at 4-5. Indeed, these Hospital fears and concerns already have been realized. Obviously, construction has not started. The time period that Con Edison now estimates it will require to complete the tunnel construction and associated facility installation work has increased from 12-16 months to 27 months. The date Con Edison now estimates construction is to commence has been delayed 7 additional months from February 2007 to September 2007. Finally, the estimated date for completion of construction has been delayed 13 additional months from March 2009 to April 2010. Each of these delays threatens to directly and substantially impact the Hospital's plans for the use and development of its property. Additional Con Edison delays no doubt will occur in the future.

Hence, these new facts provide additional support for the Hospital's concerns regarding the temporal uncertainty of Con Edison's construction schedule and its impact on the Hospital's development plans; it is crucial that any Commission order authorizing Con Edison's preferred route through the Hospital's property include the conditions and requirements recommended by the Hospital to address both the potential extent and duration of interference of the Con Edison construction with the Hospital's development plans.

3. *Time Warner's Proposal to Reroute the Facility from West 219th Street to West 220th Street Fails to Take into Account the Impact of Such a Change on the Only Entrance to the Hospital's Allen Pavilion at Broadway Across from West 220th Street*

Time Warner Cable has proposed (TWC IB at 2) to modify the preferred Con Edison route for its transmission facility from West 219th Street to West 220th Street, where it would intersect with Broadway and then turn south along Broadway towards its terminus at the Academy Substation. As explained in the Hospital's Initial Brief (at 22), "[i]f the transmission line were extended up West 220th Street to Broadway, as proposed by Time Warner, Con Edison's transmission line construction work opposite this entrance would have the serious potential effect of disrupting emergency vehicular access to the only entrance for the Hospital's facilities." Time Warner has not addressed this concern; nor has it proposed any measures to mitigate the adverse impact of its proposal on access to the Hospital facilities. This proposal should not be adopted by the Commission.

4. *Con Edison's Initial Brief Confirms the Basic Information the Hospital Seeks to Have the Commission Include as a Condition or Requirement of Any Order Authorizing Con Edison's Route to Run Through the Hospital's Property*

The Hospital has recommended that the Commission include certain conditions and requirements as part of any order issued by the Commission authorizing the Con Edison preferred route through the Hospital's property. In its own Initial Brief, Con Edison has explicitly confirmed (CE IB at 33, n.7) certain information pertaining to the size and location of its proposed facilities and easements on the Hospital's property.¹¹ Specifically, Con Edison has stated (*id*):

The Project requires a subsurface corridor approximately 22 feet wide and 100 feet long for a tunnel, which will extend west from the Harlem River towards Ninth Avenue, generally across Block 2197, Lot 174 and Block 2215, Lot 885. A surface area of approximately 1,200 square feet, as well as the corresponding subsurface area located directly east of, and adjacent to, Ninth Avenue is also required for a vertical shaft and other tunnel support facilities. The Project will also require a surface area of approximately 20,000 square feet located directly east of, and adjacent to, Ninth Avenue to support staging activities during construction.

This information confirms the Hospital's statements (NYPH IB at 11) that the Hospital had been advised by Con Edison that it would require (1) a permanent subsurface easement for its tunnel shaft located on the Hospital's property of approximately 2,200 square feet (22' x 100'); and (2) a permanent surface easement for that portion of the vertical shaft, ventilation chamber, and cable pulling chamber located on the hospitals' property of approximately 1,200 square feet. Moreover, based on Con Edison's prior on the record statements (T. at 1327) that the size of the easements required for these facilities "would be

¹¹ Simultaneously, Con Edison has sought to strike Appendix A to the Hospital's Initial Brief, which contains identical information depicted on an aerial photograph.

commensurate with the size of the facilities themselves,” Con Edison’s declarations also confirm that the subsurface easement required for the horizontal tunnel to be located on the Hospital’s property, and the surface easement required for the vertical shaft, ventilation chamber, and cable pulling chamber located on the Hospitals’ property, should be about the same size as these facilities.¹²

Hence, Con Edison’s Initial Brief serves to further confirm the size and location of its facilities and proposed easements on the Hospital’s property (subject to minor adjustments). For all the reasons set forth herein and in the Hospital’s Initial Brief, the specifics of Con Edison’s proposal are no longer in issue; hence, the Commission should include the conditions and requirements recommended by the Hospital authorizing Con Edison’s preferred route.

CONCLUSION

Wherefore, for all the foregoing reasons, together with those set forth in the Hospital’s Initial Brief, the Hospital urges the Commission:

- (a) issue an Order adopting the alternative route proposed by Commission Staff;
- (b) in the event the Commission issues an Order approving the preferred route proposed by Con Edison or any other route crossing and

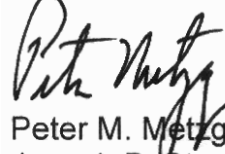
¹² Con Edison witness James Mooney has stated: “I think we have given you pretty good information on what we believe is required, and I don’t see that changing a whole lot based on what we already told you.” T. at 1327. Con Edison’s Initial Brief also identifies the location of these facilities and easements on the Hospital’s property, specifying block and lot numbers on the Hospital’s property through which the Con Edison facilities would run.

affecting the Hospital's Property, include the requirements and conditions recommended by the Hospital in its Initial Brief, as part of that Order;

(c) in the event the Commission issues an Order approving the preferred route proposed by Con Edison or any variation thereof, not to adopt the Time Warner alternative route proposal that would reroute the transmission line along West 220th Street, instead of West 219th Street, to Broadway in Manhattan; and

(d) grant such other and further relief to Petitioner as is found justified.

Respectfully submitted,



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