



3333 K Street, NW, Suite 425
Washington, D.C. 20007
Tel: 202-333-3288
Fax: 202-333-3266

March 27, 2002

Honorable Janet Hand Deixler
Secretary
New York Public Service Commission
Three Empire Plaza
Albany, NY 12223
Via Federal Express

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

Dear Secretary Deixler:

The National Energy Marketers Association (NEM) hereby submits its comments on ConEd's Phase 5 filing pursuant to the Notice Soliciting Comments issued March 21, 2002. For the reasons set forth below, NEM urges the Commission to reject ConEd's proposed reduction in the retail access credits as well as ConEd's proposed contract assignability requirement.

I. ConEd's Proposed Reduction of the Retail Access Credit Should be Rejected

By the terms of the Phase 4 program approved by the Commission, non-demand billed customers received a bill credit of 2-mill/kWh from May 1, 2001 through April 30, 2002, and demand billed customers received a bill credit 2-mill/kWh from May 1, 2001 through August 31, 2001, and 1-mill/kWh from September 1, 2001 through April 30, 2002. The credits were negotiated estimates of working capital, energy supply procurement and uncollectibles that ConEd avoids when retail customers choose ESCO service. By the terms of the settlement, the cost-based retail portions of the total credit were negotiated as 1-mill/kWh for non-demand metered customers and 0.5-mill/kWh for demand metered customers. The remainder of the credits were deemed unavoidable costs that would be deferred and recovered by ConEd.

ConEd's Phase 5 filing provides that the previously approved Phase 4 credits will be reduced to 1 mill for small customers and to .5 mills for demand billed customers to

reflect ConEd's "estimated avoided costs."¹ NEM urges the Commission to reject ConEd's proposed credit reduction.

a. ConEd Has Not Complied with the Commission's Order in Phase 4

ConEd's reduction of the retail access credit should be rejected because ConEd has not complied with the Commission's Order in Phase 4. The Order provided that,

Con Edison will be required to demonstrate, in any request for recovery for Phase 4 costs, that it could not, in fact, avoid the costs associated with the 1.5-mill/kWh retail access reductions for demand billed customers (0.5-mill/kWh after September 1, 2001) and the 1-mill/kWh reduction for non-demand billed customers.²

ConEd has not made a showing that it could not avoid the costs associated with the Phase 4 credits. Therefore, it should not be permitted to unilaterally reduce the credits for Phase 5 based on its own estimates of avoided costs that have not been reviewed by the other parties and the Commission. ConEd has neither justified recovery of Phase 4 costs nor a downward reduction to the previously-approved credits.

b. ConEd's Retail Access Credit Should be Aligned with Other Utilities' Commission-Approved Credits

NEM asserts that ConEd's proposed credit reduction should be also rejected because its' retail access credit structure is not in alignment with the credits approved by this Commission for other utilities. The Commission has previously approved credits of 2 mills for small customers and 4 mills for large C&I customers in the NYSEG,³ NIMO⁴

¹ ConEd Phase 5 Filing letter dated February 1, 2002, at 1 and Appendix B, page 2.

² Cases 00-M-0095 et. al., Order Adopting Terms of Joint Proposal, Subject to Modifications, issued April 9, 2001, at page 10.

³ Under the Commission-approved terms of NYSEG's Price Protection Plan settlement, "[c]ustomers who choose the ERO rate will receive a credit of 2 mills (Large Customers) and 4 mills (Small Customers) unless and until replaced by the Commission in the Unbundling Track." Joint Proposal at page 31. Customers that elect retail access through a market-based backout, "will receive an adder of 3 mills for Large Customers and 5 mills for Small Customers." Joint Proposal at page 30. See Case 01-E-0359, Petition of New York State Electric & Gas Corporation for Approval of its Electric Price Protection Plan and Case 01-M-0404 - Joint Petition of Energy East Corporation, RGS Energy Group, Inc. New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation and Eagle Merger Corp. for Approval of Merger and Stock Acquisition, Order Adopting Provisions of Joint Proposal with Modifications, issued February 27, 2002.

⁴ The Commission-approved NIMO settlement provides that,

"Customers selecting an alternative supplier shall be credited with a Customer Service Backout Credit of \$0.004 per kilowatthour for residential customers served under SC-1, SC-1B, SC-1C, and non-demand metered commercial customers served under SC-2, and of \$0.002 per kilowatthour for all other demand metered customer classes and customers served under PSC-214 as described in existing Rule 42."

Joint Proposal at pages 45-46 approved in Case 01-M-0075, Joint Petition of Niagara Mohawk Holdings, Inc., Niagara Mohawk Power Corporation, National Grid Group plc and National Grid USA for Approval of Merger and Stock Acquisition, Opinion No. 01-6, issued December 3, 2001.

and Central Hudson⁵ service territories. ConEd's retail access credits should be made commensurate with those instituted elsewhere across the state as a matter of fundamental fairness to consumers in ConEd's service territory.

c. In the Interim Before Embedded Cost-Based Unbundled Rates are Implemented, the Commission Should at Least Maintain the Status Quo

NEM submits that at a minimum the Commission should consider maintenance of the status quo with respect to the retail access credits established in Phase 4 in the interim before embedded cost-based unbundled rates are implemented. NEM submits that if the terms of the ConEd program are altered for the short period until unbundled rates are implemented, it will be quite costly for marketers to devise new business plans and mount new marketing campaigns to enroll customers for the Phase V program and then again when unbundled rates are in effect. NEM assumes the multiple changes will also be costly for ConEd to accommodate. In the interest of conserving all of the parties' resources for participation in the unbundling proceeding, and in the absence of an upward increase in the credit reflective of the credits in effect in other utility service territories, the Commission must at least maintain the status quo and reject ConEd's proposed credit reduction.

II. ConEd's Proposed ESCO Contract Assignment Requirement Should be Rejected

By the terms of ConEd's Phase 5 filing, ESCOs would be required to make all customer contracts expressly assignable in the event of ESCO discontinuance of service.⁶ ESCOs would also be expected to arrange for the assignment of their customers to other ESCOs under such circumstances.⁷ Otherwise, ConEd will notify ESCOs of the availability of customers and assign the customers on a proportionate basis to interested ESCOs.⁸

NEM recognizes the underlying purpose of what ConEd is trying to achieve but submits that ConEd has no authority to dictate the terms of ESCO contracts. The terms of ESCO contracts are matters of negotiation between ESCOs and their customers. Whether or not an ESCO includes an assignability clause in a contract should ultimately be a matter of the ESCO's discretion and the terms of the bargain they have struck with a customer. Accordingly, NEM recommends that the ConEd proposal to require assignability provisions in ESCO contracts should be rejected.

⁵ The Commission approved the following credits set forth in the Central Hudson settlement, "Electric Back Out Credits: Credit levels would be set at 0.5 mills per kWh for S.C. 13 customers; 2.0 mills per kWh for S.C. 3 customers; 3.0 mills per kWh for S.C. 2 demand customers; and 4 mills per kWh for S.C. 2 non-demand, S.C. 6 and S.C. 1 customers pending the outcome of the Unbundling Proceeding."

Central Hudson Joint Proposal at page 38 approved in Cases 00-E-1273 and 00-G-1274, Proceeding on Motion of the Commission as to the Rates, Charges, Rules, and Regulations of Central Hudson Gas & Electric Corporation for Electric and Gas Service, Order Establishing Rates, issued October 25, 2001, at page 16.

⁶ Appendix B, page 5.

⁷ Appendix B, page 4.

⁸ Id.

III. Conclusion

NEM urges the Commission to reject ConEd's proposed reduction in the retail access credits that ConEd failed to justify and that further misalign ConEd's credits with those in effect in other utility service territories. At a minimum, the level of ConEd's Phase 4 credits should be allowed to remain in effect for the short period until embedded-cost based unbundled rates are implemented. NEM also urges the Commission to reject ConEd's proposed contract assignability requirement as an impermissible intrusion in ESCOs' ability to transact business.

Respectfully submitted,

Craig G. Goodman, Esq.
President,
National Energy Marketers Association
3333 K Street, NW
Suite 425
Washington, DC 20007
Tel: (202) 333-3288
Fax: (202) 333-3266
Email: cgoodman@energymarketers.com
Website-www.energymarketers.com

cc: Active Parties