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February 21, 2003

Honorable Janet Hand Deixler  
Secretary  
Public Service Commission  
Three Empire State Plaza  
Albany, NY 12223

**RE: CASE 96-E-0897 - Con Edison Rate/Restructuring  
Matters - Retail Access Phase 6**

The National Energy Marketers Association (NEM) hereby submits its comments on ConEd's Phase 6 filing. For the reasons set forth below, NEM urges the rejection of ConEd's proposed reduction to the backout credits and its proposed lost revenue recovery mechanism.

**I. ConEd's Proposed Reduction of the Backout Credit Must be Rejected**

In Phase 5, the Commission held that ConEd's backout credits would remain at the Phase 4 level until full unbundling is accomplished in the Unbundling Proceeding. Accordingly, ConEd's current Phase 5 backout credits are \$0.00200/kWh for non-demand billed customers and \$0.00100/kWh for demand billed customers.

ConEd's submission for Phase 6 of its electric retail access program proposed the use of backout credits in the amount of \$0.00025/kWh for residential customers and \$0.00018/kWh for all other customers (as it proposed in the Unbundling Case) in the interim before unbundled rates are implemented. ConEd also proposed that the lost revenue recovery mechanism it set forth in the Unbundling Case, whereby a single transition charge would be assessed to all customers, should be adopted. ConEd maintains that if it is not allowed to implement its proposed recovery mechanism that it should be permitted to implement back out credits equal to its avoided costs associated

with its electric supply function (which ConEd claims are \$0.00008/kWh for residential customers and \$0.00001/kWh for all other retail choice customers).

## **II. At a Minimum, the Backout Credit Should Remain at the Status Quo**

NEM submits that at a minimum the Phase 5 backout credits should be retained at their current levels for Phase 6. ConEd has proposed implementing credits based on its submission in the Unbundling Proceeding. However, it would be inappropriate to approve ConEd's unbundling application in the context of the instant case. For instance, other evidence submitted in the Unbundling Proceeding would justify setting the credits at higher levels. NEM and the ESCO Coalition submitted testimony in the Unbundling Proceeding that supports backout credits of at least \$0.00307/kWh for residential customers and \$0.00274/kWh for other customers.<sup>1</sup> The Commission has not yet rendered a final determination on the evidence in the Unbundling Proceeding.

In the Phase 5 proceeding the Commission concluded that the backout credits should remain at the Phase 4 level until full unbundling is accomplished in the Unbundling Proceeding. The Commission agreed with NEM and several other parties that, "changing the credits at this time could create customer confusion and administrative difficulties for ESCOs and possibly hinder the development of the retail market."<sup>2</sup> NEM submits that this argument is equally applicable today, and perhaps more so, inasmuch as the ConEd specific hearings and briefings in the Unbundling Proceeding have concluded and a Commission decision should be forthcoming.

Additionally, 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 6 program and then go through the process again when unbundled rates are in effect. NEM assumes that the multiple changes will also be costly for ConEd to accommodate. In the interest of conserving all of the parties' resources for implementation of the forthcoming

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<sup>1</sup> Direct Testimony of Richard Hornby on Behalf of Amerada Hess Corporation, National Energy Service Providers, National Energy Marketers Association, and Small Customer Marketer Coalition, September 27, 2002, Ex. RH-6, Comparison of Unbundled Revenue Requirements and Rates for Contestable Services.

<sup>2</sup> Case 96-E-0897, Order Approving Phase 5 Retail Choice Program, issued April 29, 2002, at page 7.

Unbundling Order, and in the absence of an upward increase in the credit as supported by testimony submitted in the Unbundling Proceeding, the Commission must at least maintain the status quo and reject ConEd's proposed credit reduction.

### **III. ConEd's Lost Revenue Recovery Method Must Be Rejected**

The Commission in the Unbundling Proceeding adopted a two-tier mechanism for stranded cost recovery. The first part of the mechanism is to address the concern that, "a portion of the existing embedded rate supports the provision of provider of last resort service, many of the costs of which cannot be avoided. All customers benefit from that service, and all customers should contribute to recovery of its legitimate costs."<sup>3</sup> The second part of the mechanism is designed to ensure that, "a portion of the revenue shortfalls should be recovered only from customers who remain on the utility service,"<sup>4</sup> for the costs that are, "directly attributable to the service no longer being taken by the departing customer."<sup>5</sup> The Commission reasoned that, "[i]f the customer cannot avoid such costs by migrating to a competitive supplier, the attractiveness of retail access is diminished and market development will be impeded."<sup>6</sup> As a result, the Commission determined that, "a portion of the revenue shortfalls should be recovered only from customers who remain on the utility service."<sup>7</sup> ConEd's proposed lost revenue recovery mechanism merely includes a single transition charge<sup>8</sup> applicable to both retail access and full service customers.

NEM submits that ConEd's proposed stranded cost recovery mechanism does not conform to the Commission Orders<sup>9</sup> requiring a two-tier stranded cost recovery method, whereby competitive service costs are not applied to customers that migrate. ConEd's single transition charge simply ignores the directive of the Commission that a two-part

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<sup>3</sup> Case 00-M-0504, Order Establishing Parameters for Lost Revenue Recovery and Incremental Cost Studies, March 21, 2002, at page 24.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> ECOS Panel Testimony, page 45, lines 1-5 and ConEd's May 14, 2002 Filing Letters of Joel Charkow, page 2.

mechanism be utilized. The Commission has examined and repeatedly rejected the utility argument that the two-tier recovery mechanism would create a subsidy for ESCO customers.<sup>10</sup> The Commission explained that, "customers who migrate to ESCOs must be able to avoid the utility's retail service costs. No market can develop if the ESCO customer must continue to pay the utility for retail service the utility no longer provides."<sup>11</sup> Accordingly, ConEd's proposal to implement a single transition charge should be rejected, and ConEd should be required to implement a transition surcharge that properly implements the Commission directive and permits migrating customers to avoid the embedded costs of contestable services.

#### **IV. ConEd's Avoided Cost-Based Rate Proposal is Contrary to Commission Precedent and Must Be Rejected**

The backout credits approved in Phase 5 should not be reduced in Phase 6 to a level that reflects avoided costs. The Commission in the Unbundling Proceeding clearly directed the utilities to use embedded costs as the basis of establishing their unbundled rates, noting that the Commission has, "on a number of occasions, found it appropriate to use embedded costs as the basis for setting competitive rates."<sup>12</sup> Additionally, the Commission observed that, "for most consumers in most instances, utility prices are set to recover embedded costs."<sup>13</sup> Since the Commission has repeatedly recognized the necessity of using embedded cost based unbundled rates to provide proper price signals to consumers, it would be highly counterproductive and contrary to Commission precedent to use anything but embedded costs in this proceeding as well.

In prior phases considering ConEd's Retail Choice Program, the Commission had not yet issued Orders requiring the utilities to implement embedded cost based rates. Therefore, the propriety of using avoided cost methods in computing back-out credits was still being debated. However, the Commission ultimately ruled against the use of the avoided cost

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<sup>9</sup> Case 00-M-0504, Order Establishing Parameters for Lost Revenue Recovery and Incremental Cost Studies, March 21, 2002, at page 24, and Order on Rehearing and Clarification Petitions, May 30, 2002, pages 5-7.

<sup>10</sup> Case 00-M-0504, Order on Rehearing and Clarification Petitions, May 30, 2002, at page 5.

<sup>11</sup> Rev Recovery Order on Rehg. Page 5.

<sup>12</sup> Case 00-M-0504, Order on Rehearing Petitions and Motions, January 24, 2002, at page 6.

methodology. Currently, there are multiple Commission Orders directly compelling utilities to implement embedded cost based rates. Therefore, it would be inappropriate to implement rates in contravention of the clear mandate established in the Unbundling Proceeding. Accordingly, ConEd's attempt to rely on avoided costs in computing back-out credits should be rejected. This is particularly true since the market has yet to get fully allocated embedded cost based rates to compare with competitor prices.

NEM urges adherence to the Commission's oft-stated objectives of encouraging retail competition and providing proper price signals to consumers via embedded cost based rates. Only when consumers have embedded cost rates to use to purchase competitively priced products and services can the benefits of price competition be realized.

### **III. Conclusion**

NEM urges the rejection of ConEd's proposed reduction in the backout credits. At a minimum, the level of ConEd's Phase 5 credits should remain in effect for Phase 6 for the short period until embedded-cost based unbundled rates are implemented. NEM also urges rejection of ConEd's proposed revenue recovery mechanism which is in clear contravention of Commission policy. Additionally, ConEd should not be permitted to rely on avoided costs in setting its back-out credits as it would be contrary to Commission precedent.

Respectfully submitted,

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President,  
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cc: active parties (via email)

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<sup>13</sup> Case 00-M00504, Order Establishing Parameters for Lost Revenue Recovery and Incremental Cost Studies, March 21, 2002, at page 15.