Before the New York State Public Service Commission

Case 08-E-0539-Consolidated Edison-Electric Rates

Reply Brief of Consumer Power Advocates

December 8, 2008

Consumer Power Advocates (CPA) submits this Reply Brief in Case 08-E-0539, Consolidated Edison-Electric Rates.

X. Rate Design and Revenue Allocation

D. BIR Proposal

It is not the case that the nonprofit sector is adequately served by current qualifying rules. The tariff is not "sufficiently flexible" as the CIB (Company's Initial Brief) states. The eligibility for the BIR in this instance specifically requires a "comprehensive package of economic incentives." This "comprehensive" language explicitly requires that a customer qualify for several programs not just a single program. The main components of a comprehensive package are benefits related to low cost financing; sales and real property tax benefits; wage, corporate income and other employment related tax benefits; and, government sponsored low cost power programs (that require a tax benefit program to qualify). All of these programs are either tax related or require a tax benefit in order to qualify. Since the only program that is reasonably available to the non-profit sector is related to low cost financing, this sector is essentially precluded from receiving a comprehensive package. If it is true that low cost financing is a valid qualifying criteria, then that should be made explicit in the tariff.

In addition to allowing the nonprofit sector to qualify for the BIR, there is still a need for a set-aside for the Nonprofit Biomedical sector. In its Initial Brief, Con Edison states that there is sufficient volume in two of the three BIR categories to serve Nonprofit Biomedical load. However, absent the change in qualifying criteria enumerated above, these volumes are not available to the Nonprofit Biomedical projects. We are requesting that a portion of this available load be opened up to this sector. When Con Edison originally approved the Bio-medical BIR it was the first case where Con Edison had approved a BIR qualification that did not require development of underutilized property or additional government sponsored benefits. These original criteria were established because Con Edison felt that having the government verify the importance of the project to the local economy or reintroducing building stock into the service territory would benefit the rate payers in the long term. This change in qualification criteria represented an admission by Con Edison

that supporting the Nonprofit Biomedical industry itself would have a profound impact on the local economy because of the strong ability of this sector to generate revenue.
The Commission has also already determined that the Biomedical BIR is appropriate. The Commission's rejection in the last case was based on incorrect advice that the Non-profit Biomedical BIR was not fully subscribed. In fact, it was fully subscribed. We are only requesting that additional volume be made available to this sector. While changing the language of the "comprehensive package of economic incentives," will somewhat satisfy many of these projects' ability to qualify for the BIR, not all of the projects use financing to develop the projects. It is therefore, equally important that the Bio-medical set aside remain in effect even if the comprehensive language is modified to include low cost financing.
The Nonprofit Biomedical sector is the most successful in utilizing the BIR relative to initial expectations, based on the fact that it is the only category which is fully subscribed. The growth of the Nonprofit Biomedical sector as previously documented compared to the decline of other once prominent sectors and the continued decline of these sectors, make it apparent that the overall BIR set aside may not be fully subscribed in the short term. What purpose would be served to have the fastest growing industry decide not to go forward with projects or to build them on a smaller scale because the economics of the projects are untenable and a potential difference maker such as the BIR is unavailable while BIR power is unused because other sectors are not even considering expansion? Our members have told us that it is absolutely the case that projects are being postponed or scaled back as the economy worsens. A recent article in USA today predicts that the biotechnology industry may be the next sector to request bailouts from Washington.[1] As previously reported in the CPA testimony, 62% of the 2009 New York State budget reductions, about $1.6 billion, will impact higher education and healthcare.[2] Our testimony is further replete with the disproportionate impact of electric costs on these institution's costs.

In Con Edison's rebuttal they state that the point of the BIR is to, "encourage a potential customer to relocate to the Company's service territory or to retain an existing customer who is considering relocating out of the Company's service territory. The customers in question meet neither of these qualifications." [3] In fact, our testimony is replete with evidence that these facilities will be built somewhere if there is a need for them. By demonstrating the overwhelming growth of this industry nationally and internationally, we have shown that the growth potential exists. It is obvious that if the growth development does not happen in NY it will take place elsewhere. We cite several studies to support these

[1] Biotech firms face cash shortage, USA Today, November 22, 2008.

[2] Testimony of Catherine M. Luthin, Principal, Luthin Associates, Inc. On behalf of: Consumer Power Advocates (CPA), p.10

[3] ELECTRIC RATE PANEL – REBUTTAL ELECTRIC, p. 34 line 23

statements and New York State's $600 million financial commitment to this industry is further evidence.[4]

Con Edison further missed the point of its own programs. By making one of the requirements that the facilities supporting the BIR must be new or vacant, they are clearly demonstrating that the mere development of these properties and reintroducing them into the building stock of New York will have a long term positive impact on the economy and the rate payers. For many years, prior to adding the Nonprofit and Comprehensive package qualifications, the only requirement for the BIR was the development of a new or vacant building and an associated real property tax abatement qualification. There was no requirement to offset a potential retention or attraction of jobs. While this may have been a side benefit of the program, the BIR was clearly focused on redeveloping empty spaces. It was only with the pressure from the City of New York and later the CPA that the formal requirement of other factors became a pre-requisite. By allowing non-profits to develop these vacant spaces, the local economy will continue to reap the benefits of the developments.

CPA is attempting to level the field for qualifying for the BIR for New or Vacant buildings. We requested that a level of investment in property improvements similar to the ICIP program be used to qualify for this benefit because it mirrors the requirements of the property tax and energy program qualifications that are available to taxpaying entities.[5] Con Edison has rebutted this request on three levels.[6] The first objection is, "This kind of assessment is better left to a governmental agency as recognized under both the Comprehensive Package Program and under the New and Vacant Program." There is no explanation as to why Con Edison believes this. The second objection states that because there are $ 5 billion in projects under planning, there is no need to provide further incentives. This argument fails to recognize that the projects are merely being planned. They have not been built. CPA's argument is that the planning element demonstrates that the industry has the desire and the basic elements i.e. the market for and intellectual capital to expand, elements that do not exist in other business sectors. However, Con Edison does not recognize that recent economic conditions are having a negative impact on the ability to bring the plans to fruition on the same level as planned or to build them at all. The third objection is that CPA has not demonstrated that the nonprofit sectors can not qualify under the Energy Cost Savings Program. The qualifying rules for the Energy Cost Savings Program require that the, "Businesses applying in connection to a capital improvement

[4] Testimony of Catherine M. Luthin, Principal, Luthin Associates, Inc. On behalf of: Consumer Power Advocates (CPA), p.19

[5] [5] Testimony of Catherine M. Luthin, Principal, Luthin Associates, Inc. On behalf of: Consumer Power Advocates (CPA), pp.5 -6

[6] ELECTRIC RATE PANEL – REBUTTAL ELECTRIC, pp. 40 -41.

must either be financing their improvement through the Industrial Development Agency (IDA), or be seeking benefits through the New York City Industrial and Commercial Abatement Program (ICAP).[7]" The ICAP program is a real property tax program which we have argued throughout this proceeding is the type of tax abatement program not normally available to nonprofits. The IDA financing is one example of a low cost financing program which we have encouraged Con Edison to add as one of the qualifying requirements of the Comprehensive Package program. While it is true that an IDA can be used to qualify for the New and Vacant Building BIR, by its nature, it is only available to very large projects and its availability is limited to the legal bonding abilities of the government agencies. All we are asking is that the non-profit sector has an equal opportunity to qualify for the BIR as the for-profit sector. Enabling a nonprofit to qualify for the BIR by meeting the same requirements of the ICAP program will achieve this.

Con Edison's rebuttal of CPA testimony focuses on only those statistics that they believe make a case that the cost of electricity is not critical to the development of the Nonprofit Biomedical industry. It is curious that Con Ed would suddenly take this contrary position after supporting this position only seven years ago when the Biomedical BIR was first approved. They do not identify any issues that may have changed during the period since that would make electric costs less important to the development of the industry. Con Edison also ignores the data that shows how this industry sector has the highest electric intensity and electric costs of all major sectors except industrial (where it is comparable) ; and, how the ratio of energy usage to operating costs is highest in New York as compared to other regional centers.

Con Edison is also critical of our testimony related to a study, the Boyd Report, that compares the expenses of the major bio-technology centers in the country. Con Edison criticizes CPA's approach to remove wages from the equation when calculating the impact of electric costs on operating costs.

Regardless of whether wages are included or not, it can not be argued that electric costs in New York are higher than anywhere in the region. In fact, the Boyd Report used electric costs of $0.0657 and $0.1334 per kWh for the New England and Quebec regions. The highest cost on the west cost was $0.1421.[8] This compares to electric costs for CPA members of $0.1968 per kWh for the same period. It should be noted that although the Boyd Report analyzed comparative costs for 60 of the top biotechnology centers in the USA and Canada, New York City was not even included in this analysis. It appears we still have many obstacles towards making this region a center for biotechnology. Removing the impact of electric costs will help achieve this goal.

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[7] See ECSP rules at http://www.nyc.gov/html/sbs/nycbiz/html/incentives/ecsp.shtml

[8] The Boyd Company, A COMPARATIVE OPERATING COST ANALYSIS FOR THE BIOTECHNOLOGY INDUSTRY 2005, NEW ENGLAND & QUEBEC REGION- EXHIBIT IIIANNUAL ELECTRIC POWER AND NATURAL GAS page 20.

F. Submetering

1. SC 8 & SC12 Customers

In its initial brief, in order to refute the position, shared by the company and CPA, that rewiring for multiple meters would be excessively costly, Staff responded that “Con Edison would not incur any costs… The building owner would be responsible for such costs.” (SIB 280) Words fail us. We thought the whole point of this case was to insure that costs to born by consumers were held to reasonable levels. Who knew that Staff considered costs assigned to building owners beneath its consideration? Staff erred further when it repeated its incorrect assertion that NYSERDA funding is available for this purpose. (SIB 280) NYSERDA funding is only available for use with other efficiency measures, not for simple rewiring to install multiple meters.

2. Dormitory Submetering

Staff asserts that the Order Prohibiting Rent inclusion of Electricity is applicable in the case. It is not. The distinction here is not that the residents are students, as Staff asserts, (SIB 283) but that they are temporary residents who occupy the premises without leases. In this case, “temporary” means less than one year. Further, Staff’s assertions that that NYU ‘…is not interested in ensuring that its students have any reason to conserve electricity…” (SIB 284) is contradicted by the record. Finally, Staff’s snarky, but irrelevant, footnote, implying that NYU does not sufficiently address conservation in its educational programs is made ridiculous by the major commitments NYU has made in its environmental sciences and engineering programs.

XI. Other Issues

F. Retail Access Issues
2. Display of Full Service Costs on Retail Access Bills

In its initial brief, the Company correctly notes that energy decisions are best made based on cost periods of more than one month, but fails to acknowledge that the cost of energy for the year can most easily be determined by summing the twelve months of the year. The Company goes on the correctly note that our proposal will generate some (as yet unquantified) costs for the Company, citing “…complex system requirements…” (CIB 511-512) While the Company frequently finds such complexities in order to avoid improvements in its own operations, at the same time it fails to acknowledge this same information is costly to customers in terms of resources spent duplicating “complex” tariff provisions, and that the price to customers of not having that information include the cost of unnecessarily costly supply contracts, the loss of customer confidence in the market and ultimately reduced support for retail access generally.

SCMC repeats many of the Company's arguments concerning the "misleading" nature of accurate cost information. (SCMC IB 9-10), but goes further. SCMC is simply incorrect in its assertion that our proposal would misstate full service costs by ignoring the savings related to the merchant function charge, and it fails to enumerate any of the "…possible reductions tax obligations and other benefits that may not be reflected in the utility pricing information…" (SCMC IB 10) The CPA proposal is to display the full service costs, meaning all the charges that apply to full service customers.

SCMC goes on to assert that the provision of such data is "anti-competitive," inasmuch as Con Edison is a competitor in the supply market. (SCMC IB 10) SCMC incorrectly states that Con Edison rates should not be disclosed because of competitive concerns. This is simply not the case. Con Edison supply rates are determined by tariff, not by market forces or marketing strategy. Those rates are by law and by regulation made public, but the undeniable fact is that the determination of particular bills has been made so complex as to be beyond the ability of most consumers. The display of full service costs on all retail access bills merely remedies that unfortunate situation.

There can be no doubt that this information will help consumers enjoy the promised benefits of retail competition. CPA has been a strong supporter of restructuring and competitive markets generally, but our experience is that benefits if competition are not yet obvious to many, or most, consumers. Display of full service costs will provide transparency to the mass market that is essential to the success of the retail access program. On this issue, the commission would do well to follow the policy of the Syms department store: "An educated consumer is our best customer." (www.syms.com)

G. CAIC

In its initial brief, staff incorrectly characterizes our objections to its half-baked CAIC proposal. Staff asserts, without any evidence whatsoever, that its CIAC proposal "could result in a more equitable allocation of costs going forward." (SIB 336) In this context, "more equitable" can only mean that similarly situated customers pay the same costs for the same service, but, contrary to Staff's assertion, customers who are required to make CAIC payments will obviously pay more for service than customers who are not or will not be required to make those payments. Staff has provided no evidence that facilities installed to serve new loads in 2008 will provide any less return over their service life than the returns provided by facilities installed in the past. Moreover, Staff has not answered the question of what "…portion of system upgrades…" (SIB 336) will be paid by new customers, or whether new customers will be required to reimburse the Company of a "portion" of future existing excess capacity that no doubt will be installed as part of CAIC supported construction from time to time. The fact that Staff's proposal applies to only a "portion" of the costs of necessary facilities is no comfort to customers, who have no expertise in either the cost or necessity of utility distribution facilities, or the allocation of their costs among the various undefined "portions" proposed by Staff.

Staff has not addressed the equity issue raised by CPA. CAIC would require new customers to fund improvements to property that those customers do not own, the cost of which cannot be financed through mortgage secured debt, nor recovered in the event of a business liquidation. Seen in this light, CAIC is simply an entry barrier for new business. This is particularly wrong-headed in this time of economic uncertainty.

Respectfully submitted,

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