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## CASE STUDY

# The Long Island City Power Outage Settlement: A Case Study in Alternative Dispute Resolution

ELEANOR STEIN\*

### INTRODUCTION

In April 2008, an extraordinary agreement—styled a Joint Proposal—was reached among an adversarial array of government, industry, community, and public interest parties. The Joint Proposal, negotiated over the course of a year, ended an inquiry conducted by the New York State Public Service Commission (NYPSC or Commission), the state administrative agency that regulates New York’s investor-owned energy utilities. The Commission’s staff was investigating the causes of a nine-day electric power outage in Consolidated Edison Company of New York, Inc.’s (Con Edison) Long Island City, Queens, network, an outage that affected as many as 175,000 people.<sup>1</sup> The Joint Proposal, as approved, provided for termination of the Commission’s review of the utility’s outage-related decisions in exchange for a rate benefit of \$46 million for all Con Edison customers, and a \$17 million community benefit fund for Western Queens. This benefit was dedicated half to bill credits to area customers, and half to planting trees and delivering additional environmental and energy-usage reducing enhancements to the

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\*Adjunct, Albany Law School and State University of New York at Albany; Administrative Law Judge, New York State Public Service Commission. The author would like to thank Administrative Law Judge Jeffrey Stockholm, for his valuable suggestions. However, this piece represents solely the author’s opinions and not those of the Public Service Commission or any other of its employees.

1. See DEP’T OF PUB. SERV., STAFF REPORT ON ITS INVESTIGATION OF THE JULY 2006 EQUIPMENT FAILURES AND POWER OUTAGES IN CON EDISON’S LONG ISLAND CITY NETWORK IN QUEENS COUNTY, NEW YORK 2 (2007), [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/F813FD973CA2310285257267004B9E83/\\$File/LIC\\_FINAL\\_REPORT\\_FEB\\_9\\_07.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/F813FD973CA2310285257267004B9E83/$File/LIC_FINAL_REPORT_FEB_9_07.pdf?OpenElement).

communities directly affected by the power outage. Of those funds, \$500,000 was earmarked for a study of the outage's economic and health consequences. Finally, Con Edison agreed its CEO would sign and send to customers a letter of apology.

This is an examination of the settlement process leading up to this agreement in the context of an administrative proceeding.<sup>2</sup> The agreement reflected the determination and dedication of the participating parties, and stands as an example of the critical advantage offered by alternative dispute resolution practice: the opportunity to create value in a situation where participants are polarized or stalemated.<sup>3</sup> Changing the terms of the discourse, not once but repeatedly, opened possibilities for agreement even when some parties perceived the negotiation as a zero-sum situation where no agreement seemed possible. And the parties' Joint Proposal, approved by the Commission, afforded a multifaceted and meaningful outcome, beyond the authority of an administrative agency otherwise left to craft equitable remedies.

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2. In the initial stages of this investigation, the author presided as Administrative Law Judge (ALJ) for the establishment of the early procedural steps in what began as a New York Public Service Commission (NYPS) Staff investigation. In April 2006, Judge Jeffrey Stockholm was assigned to preside over a second, litigated prudence phase, and the author became the mediator. The NYPS has an active alternative dispute resolution (ADR) practice, spelled out in detail on its web site. N.Y. State Public Service Commission, Dispute Resolution at the Department of Public Service, [http://www.dps.state.ny.us/ADR\\_Overview.htm](http://www.dps.state.ny.us/ADR_Overview.htm) (last visited Nov. 15, 2009). Not only are numerous individual cases resolved through alternative dispute resolution methods but, these approaches have been institutionalized. Both a litigation and a settlement ALJ will be assigned to new cases, where appropriate. The two judges do not communicate about substantive matters under discussion at the negotiating table. This protocol prevents the decision-maker from learning about settlement offers. Parties have the opportunity to sit down with each other and a neutral mediator; and at the same time to litigate unresolved disputes before a litigation judge. A mediator is bound to protect, and not disclose, the substance of negotiations, discussions or offers to settle. N.Y. COMP. CODES R. & REGS. tit. 16, § 3.9(e) (2009). Therefore, this essay relies exclusively on the public record in this proceeding, as well as general sources and experts in the mediation field on the theory of complex, multi-party public policy dispute resolution. The official record of this proceeding is *available at* N.Y. State Public Service Commission, Queens Power Outage, <http://www.dps.state.ny.us/06E0894.htm> (last visited Nov. 15, 2009).

3. ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 101-05 (2000) (exploring the concept of negotiation and mediation, in contrast to litigation, not simply distributing benefits but actually creating value).

## I. MULTI-PARTY PUBLIC POLICY DISPUTE RESOLUTION

The mediation of a complex, multi-party, public policy dispute is in some ways just like a two-party private mediation. All the same tools are brought to bear and the same basic stages of mediation are negotiated. Practitioners and theorists divide and name these stages differently, but there is a *lingua franca*. The first stage can be called a contracting stage, when the mediator explores the negotiation process with parties so that all participants become familiar with mediation<sup>4</sup> and agree on ground rules, such as confidentiality, mutual respect, or how much time to set aside for the mediation. The next stage involves active listening, to elicit from parties the interests or concerns that underlie their litigation positions, moving from positional bargaining to interest-based bargaining.<sup>5</sup> Critical to this stage of the mediation process is the mediator's continual role in encouraging all parties to identify their Best Alternative to a Negotiated Agreement (BATNA).<sup>6</sup> After all, any outcome can only be realistically and productively evaluated in comparison to the possible outcomes of proceeding with the administrative litigation. If parties remain focused on what litigation will provide them, they will tend to seek a negotiated outcome, if for no other reason than to avoid placing their fate entirely in the hands of the final decision-maker, who is likely to be unaware of the full ramifications of the dispute outside the formal record.

As in most cases, during the Long Island City dispute, the parties bargained in the shadow of the law and the administrative litigation continued in parallel with the

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4. In some cases observed by the author, NYPSC mediators have brought in a skilled trainer, to expose the negotiating parties to the basic tools and principles of alternative dispute resolution.

5. See CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 329-31 (2005). The common use of a phased approach should not mask the differences among practitioners and across a wide spectrum of mediation approaches (from strongly mediator-directed to strictly party-controlled). *Id.* at 302-28.

6. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., Penguin Books 1991) (1983) (contributing to the popularization of the critical concept and breakthrough approach known as BATNA); see also MENKEL-MEADOW ET AL., *supra* note 5, at 125.

negotiations. As the legal framework of the proceeding evolved and developed, the respective risk exposures and potential benefits of the litigation solution swirled and changed as well. In contrast to the commonly used alternative of halting litigation to allow negotiations to progress, in this case, the administrative litigation provided a backdrop that may have brought the negotiating parties closer to common ground.

From the identification of the parties' respective interests comes a brainstorming of options for settlement. In the course of this process, some bases for what Fisher and Ury term "principled negotiation"<sup>7</sup> can emerge in determining what the objective standards or bases for an agreement are. The last stage, or execution, entails bringing the parties together, ensuring that they understand the process that is set in motion when they submit a Joint Proposal to the Commission for its final determination.

While these stages are common to private and public policy dispute resolution, a public policy dispute presents some unique process challenges for a mediator. Among these stages is the importance of ensuring that all necessary parties are notified that discussions are ongoing and that they have the opportunity to take a seat at the negotiating table. Another is the need to, on the one hand, protect the confidentiality of the mediation process and, on the other, respect the value of transparency in government. This tension characterizes public disputes but not private ones.<sup>8</sup> The model mediation statutes may protect the confidentiality of the private negotiating table, but fall short on recognizing that negotiation may be producing results that affect the public far beyond the participants.<sup>9</sup> In the context of the NYPSC, a settlement among the parties is merely a Joint

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7. See FISHER & URY, *supra* note 6, at xviii, 10.

8. MENKEL-MEADOW ET AL, *supra* note 5, at 392-93 (citing Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981) (discussing how private mediations may implicate larger, public concerns)). For example, in an environmental mediation, parties may reach an agreement, but that agreement may fail to take into account impacts on a broader family of natural resources.

9. See, e.g., 2009 N.Y. Assem. B. No. 8497 (proposing the Uniform Mediation Act, amending the Civil Practice Law and Rules by adding new article 74 to provide, in pertinent part, that "a mediation communication is privileged . . . and is not subject to discovery or admissible in evidence in a proceeding").

Proposal to the Commission. The Joint Proposal must be filed, and once that happens, it enters the public realm entirely. It will be subject to public comment, statements in support and in opposition will be heard, and an evidentiary hearing is held on the record. Without Commission approval, a Joint Proposal has no legal effect and the Commission may modify it and decide to reject some or all of its terms as contrary to public policy.<sup>10</sup>

Almost two years after the outage, and following one year of mediated negotiations, parties crafted an agreement that provided value to the participants, the utility, New York City and the Western Queens community.

## II. THE JULY 2006 ELECTRIC POWER OUTAGE AND THE COMMISSION INVESTIGATION

From late July through early August 2006, New York City experienced two protracted and severe heat waves. The city suffered three consecutive days at or above 100 degrees, following five days in the 90-degree range. A New York City Department of Health study attributed 140 excess deaths to the heat, including forty from heat stroke.<sup>11</sup> This was New York's highest heat stroke mortality on record since 1952.<sup>12</sup>

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10. For example, parties to a Commission proceeding concerning the siting of electric or natural gas transmission facilities may seek Commission approval of the terms of a Joint Proposal mutually arrived at and to the satisfaction of all parties. N.Y. PUB. SERV. LAW art. VII (McKinney 2009). However, the Commission is required to make certain findings and determinations in order to grant a certificate of environmental compatibility and public need for the construction of a transmission facility. N.Y. PUB. SERV. LAW § 126(1) (McKinney 2009). These findings include that the facility is needed and that it represents the minimum adverse environmental impact. N.Y. PUB. SERV. LAW §§ 126(1)(a)-(c). Therefore, the Commission makes such findings independent of and not bound by the parties' consensus as reflected in their Joint Proposal. The instant case illustrates the Commission's practice of, at times, modifying an agreement of all parties—even when one of those parties is Department of Public Service Staff. *See infra* The Public Service Commission Adoption of the Joint Proposal Terms at Part III.E. In approving the settlement, the Commission also modified it in certain respects.

11. Richard Perez-Pena, *Heat Wave was a Factor in 140 Deaths*, *New York Says*, N.Y. TIMES, Nov. 16 2006, available at <http://www.nytimes.com/2006/11/16/nyregion/16heat.html>; see also Mathias Vuille, Professor, Dep't of Atmospheric and Env'tl. Scis. at Univ. of Albany, Presentation at Albany Law School, *The Science of Climate Change: Current Knowledge, Uncertainties and Projects*, slides 24-26 (June 24, 2009) (discussing how the July 2006 New York City heat wave was only a shadow of the one in Europe in August 2003,

Beginning on July 17, Con Edison experienced problems with its electric network in Long Island City, Queens. In a perfect storm of cascading events, critical elements known as feeders<sup>13</sup> in Con Edison's system failed. Faced with the choice of maintaining the network in operation and trying to repair it in that state, or shutting it down entirely, Con Edison's emergency leadership

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considered the cause of 22,000-35,000 heat-related deaths). An event such as the European heat wave was expected to occur naturally once in 1,000 years, but scientists now predict that by 2040 that will be an average summer and by 2060 it will be a cold summer, according to Professor Vuille. No specific weather pattern, even a heat wave, can be linked to global climate change, and the record and findings in the Long Island City investigation did not attribute the outage to climate change effects. However, North American temperatures are predicted to rise over the next decades, and there are some practical lessons from what may be a random series of weather events or may be precursors of what is to come. Cities are engineered to certain parameters of what is expected. For example, Washington, D.C. can be paralyzed by a snowfall that would barely be noticed in Buffalo, New York. Our subway systems, shorelines, airports, and electric power distribution systems are designed to withstand predictable stresses. When stresses advance beyond what was predicted historically, systems can and do fail. The recurring and intensifying heat waves, hurricanes, and floods of the last ten years are causing some cities to reexamine their flood plain mapping, electric system design and other assumptions, to anticipate and adapt to climate change effects.

12. N.Y. CITY DEP'T OF HEALTH AND MENTAL HYGIENE, N.Y. CITY VITAL SIGNS INVESTIGATION REPORT NOVEMBER 2006 SPECIAL REPORT (2006), <http://home2.nyc.gov/html/doh/downloads/pdf/survey/survey-2006heatdeaths.pdf>; *see also* Perez-Pena, *supra* note 11 (defining the term excess deaths to represent deaths beyond those statistically expected over a given time period in a given location).

13. *See* CON EDISON, INITIAL REPORT ON THE POWER OUTAGES IN NORTHWEST QUEENS 1.4-1.6 (2006), [http://www.dps.state.ny.us/06E0894/06E0894\\_CE\\_Initial\\_Power\\_Outage\\_Report.pdf](http://www.dps.state.ny.us/06E0894/06E0894_CE_Initial_Power_Outage_Report.pdf) (the Con Edison system is enormous and complex. Power plants generate electricity that is transmitted over high-voltage, long distance transmission lines. As described by Con Edison, these transmission lines,

supply area substations where the voltage is reduced . . . From the area substations, primary feeders distribute the power and feed a secondary system. One type of secondary system is called a network system in which each feeder supplies a network grid of transformers located throughout local streets. These transformers serve to further reduce the voltage for use by customers.

*Id.*

In the case of the Long Island City event, a North Queens substation supplied the Long Island City network via a total of twenty-two feeders. Long Island City used a network design, built entirely underground, and designed to sustain the loss of up to two feeders on a peak summer day. On the worst outage days, Con Edison lost twelve of the twenty-two feeders in the Long Island City network. *Id.*

decided to continue operating the network with a reduced capacity, mobilizing its customers to lower their usage. However, the network failures continued to spread until July 25, with extensive and protracted customer outages.<sup>14</sup> On July 26, the New York State Public Service Commission, after monitoring the unfolding outage and its consequences, instituted a new proceeding: a Department of Public Service Staff (Staff) investigation, and this process was set in motion.<sup>15</sup>

At the Commission's direction,<sup>16</sup> the Staff began an exhaustive examination of the circumstances leading to the failure of the feeders and the customer outages. The process encompassed discovery, independent investigation, and an informal technical conference at which experts for the utility, the Staff, the City and others exchanged information about the circumstances and hour-by-hour decisions the company made during this crisis.<sup>17</sup> Parties began to formulate their own theories about the course of action Con Edison had taken, and whether or not it was, in regulatory parlance, "prudent." During this process, the utility was restoring its network, replacing damaged equipment, and reassuring its customers and the City that the crisis was over. In addition, Con Edison had already

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14. See Case 06-E-0894, N.Y. Pub. Serv. Comm'n, Proceeding on Motion of the Comm'n to Investigate the Electric Power Outages in Consolidated Edison Company of New York, Inc.'s Long Island City Electric Network, Order Instituting Proceeding and Directing Staff Investigation (July 26, 2006), available at [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/0663A4CE668EE579852571B700671EB5/\\$File/06e0894\\_07\\_26\\_06.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/0663A4CE668EE579852571B700671EB5/$File/06e0894_07_26_06.pdf?OpenElement).

15. *Id.* The New York State Department of Public Service is an executive agency established by Section 3 of the Public Service Law. The Public Service Commission's members are appointed by the governor for six-year terms, with advice and consent of the State Senate. The governor appoints a commission chairman, who is also the chief executive officer of the Department and oversees its staff, pursuant to Public Service Law § 5.

16. *Id.* at 1.

17. On February 7, 2007, Department of Public Service staff issued its final report on the Con Edison Long Island City outage; the report details both the day-to-day unfolding of the outage, and the process used in conducting the investigation. N.Y. STATE DEP'T OF PUB. SERV. COMM'N, DEPARTMENT OF PUBLIC SERVICE STAFF REPORT ON ITS INVESTIGATION OF THE JULY 26, 2006 EQUIPMENT FAILURES AND POWER OUTAGES IN CON EDISON'S LONG ISLAND CITY NETWORK IN QUEENS COUNTY, NEW YORK 14-15 (2007) [hereinafter LIC STAFF REPORT], available at [http://www.dps.state.ny.us/06E0894/06E0894\\_Comments\\_attnbzth.Pdf](http://www.dps.state.ny.us/06E0894/06E0894_Comments_attnbzth.Pdf).

voluntarily eschewed recovery of \$59 million in operation and maintenance expenses resulting from the outage.<sup>18</sup>

Long Island City, in northwestern Queens, is a vibrant community, including single family and apartment houses, its streets lined with Greek, Italian, and Spanish restaurants and small businesses ranging from bakeries to computer services. Con Edison had roughly 115,000 customer accounts in Long Island City, estimated to serve 460,000 people.<sup>19</sup> As the investigation proceeded, so did the public inquiries and outcry over the duration and the consequences of the outage in the Long Island City community. As part of its investigation, the Commission held a series of nine public statement hearings over all the affected neighborhoods in Western Queens: Woodside, Long Island City, and Astoria.<sup>20</sup> At these hearings, with Arabic, Greek, Korean, Spanish and Turkish interpreters available, a parade of Con Edison customers berated both the utility and the regulators. Speakers included elderly apartment dwellers stranded without refrigeration or air conditioning during the heat wave and owners of local electronics services businesses, who

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18. *Id.* at 11. Under normal circumstances, Con Edison would not be able to recover these costs unless the Commission granted a petition to defer the costs for future recovery. N.Y. COMP. CODES R. & REGS. tit. 16, § 61.1 (2009). If the Commission found the company acted imprudently, the petition would be denied.

19. In this report, Con Edison places its Long Island City “customer” total at 115,000. This figure represents utility accounts, rather than individuals. Staff estimates that a typical utility account serves four individuals. CON EDISON, INITIAL REPORT ON THE POWER OUTAGES IN NORTHWEST QUEENS 2.1 (2006), [http://www.dps.state.ny.us/06E0894/06E0894\\_CE\\_Initial\\_Power\\_Outage\\_Report.pdf](http://www.dps.state.ny.us/06E0894/06E0894_CE_Initial_Power_Outage_Report.pdf).

20. Press Release, Public Service Commission, Chairman Flynn Initiates Broad Investigation of Queens Power Outage (July 26, 2006), *available at* <http://www.dps.state.ny.us/06E0894.htm> (announcing hearings in Astoria & Long Island City, Queens); Announcement, N.Y. State Public Service Commission, Announcement of Additional Public Hearing Regarding Queens Power Outage (July 28, 2006), *available at* <http://www.dps.state.ny.us/06E0894.htm> (announcing an additional hearing in Astoria); Press Release, Public Service Commission, New Location and Time for NYPSC Power Outage Hearings on August 3rd & 9th (July 31, 2006), *available at* <http://www.dps.state.ny.us/06E0894.htm> (announcing hearings in Astoria); Notice, N.Y. State Public Service Commission, Notice of Additional Public Statement Hearings and Educational Forums (Oct. 6, 2006), *available at* <http://www.dps.state.ny.us/06E0894.htm> (announcing hearings in Astoria and Woodside).

recounted narratives of their vulnerable equipment irreparably damaged by repeated outages and associated voltage variations.

On February 9, 2007, the Staff issued its final report on the causes and extent of the Long Island City outage.<sup>21</sup> In its report, the Staff concluded that about 174,000 people lost service or experienced low voltage.<sup>22</sup> Other extensive reports were also published by the New York State Assembly, the New York State Attorney General, the City of New York and, as required by law, Con Edison itself. In its report, Con Edison acknowledged an unusually large number of customer outages. Regretting the event, Con Edison concluded it acted reasonably and that its actions prevented a wider network shutdown and further damage.<sup>23</sup> The Department of Public Service Staff report, although focused on contemporaneous repair and restoration of the damaged network, concluded that the company failed to address underlying network problems or take appropriate actions to minimize the impact of feeder and other failures.<sup>24</sup> In addition, the Staff report concluded the utility lacked effective communication with its customers and public officials about the extent of the outage, and that Con Edison's performance was unreasonable.<sup>25</sup> In many respects, other parties, including New York City, the Attorney General, Western Queens Power for the People, New York State Assembly members, and the Utility Workers agreed. Many parties urged the Commission to expand its investigation to include a review of the prudence<sup>26</sup> of Con

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21. LIC STAFF REPORT, *supra* note 17.

22. *Id.* at 2.

23. See Case 06-E-0894, N.Y. Pub. Serv. Comm'n, Proceeding on Motion of the Comm'n to Investigate the Electric Power Outages in Consolidated Edison Company of New York, Inc.'s Long Island City Electric Network, Order Commencing Prudence Investigation 2-3 (Apr. 18, 2007) [hereinafter Prudence Order].

24. See LIC STAFF REPORT, *supra* note 17, at 6.

25. *Id.* at 8.

26. The concept of "prudence" in utility law is a fundamental one; a regulated investor-owned utility may only charge its customers for costs of delivering service incurred prudently—that is, reasonably. A prudence investigation by a regulatory agency is likely to examine whether the utility behaved in a reasonable manner, under the circumstances present at the time of the disputed conduct. Courts have upheld a "general prudence standard" as "what a reasonable person would do under the circumstances without the benefit of hindsight." *Rochester Gas & Elec. v. Pub. Serv. Comm'n*, 501 N.Y.S.2d 951 (App. Div. 1986). In addition, "[h]istorically, utility expenditures initially have been

Edison's decisions during the outage, and its maintenance of its system and communications with its customers in advance of the crisis. Indeed, the lack of effective communications with customers, the press, and government emerged as a major theme of both the investigations and the subsequent negotiations. Many of Con Edison's customers felt uninformed and misinformed throughout the crisis.

By its order issued April 18, 2007, the Commission expanded the scope of this proceeding to determine the prudence of Con Edison's actions and practices relating to the outage.<sup>27</sup> The Commission charged the Administrative Law Judge (ALJ) with a threshold determination as to whether the Staff Report provided "a tenable basis for raising the specter of imprudence [such that] the utility can be called upon to defend its conduct."<sup>28</sup>

### III. THE MEDIATION

#### A. The Contracting Stage

On the eve of the Commission's decision to expand the investigation to a prudence review, Con Edison proposed to seek an alternative resolution; however, a public exploratory discussion with parties found no takers, and the prudence proceeding went forward.<sup>29</sup> Months later, after considerable discovery and motion practice, exploratory discussions with several parties led to Con Edison filing and serving all active parties with a notice of impending settlement negotiations.<sup>30</sup>

In order to bring the necessary parties to the table, efforts were first exerted to ensure that the affected community was represented. One community group, Western Queens Power for the People, was formed during the outage and dedicated itself to

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assumed to be exercises of reasonable managerial judgment." *See In re New York City Hous. Auth. v. Pub. Serv. Comm'n.*, 260 N.Y.S.2d 340 (App. Div. 1965), *modifying* 17 N.Y.2d 246 (*citing* Missouri ex rel. Southwestern Tel. Co. v. Pub. Serv. Comm'n., 262 U.S. 276, 289 (1923) (Brandeis, J., concurring); *see also* Long Island Light Co. v. Public Serv. Comm'n, 523 N.Y.S.2d 615, 620 (App. Div. 1987).

27. Prudence Order, *supra* note 23.

28. *Id.* at 18 (*quoting* Long Island Lighting Co., 523 N.Y.S.2d at 620).

29. Prudence Order, *supra* note 23, at 14-15.

30. This filing, and the notice to all parties, is required by Commission regulation. *See* N.Y. COMP. CODES R. & REGS. tit. 16, § 3.9(a) (2009).

participating in the negotiations. In addition, city and local representatives, including the City itself, the Office of the Queens Borough President, several members of the New York State Assembly (most actively Richard Brodsky), the Attorney General, and other consumer advocates participated and contributed. Appropriately “setting the table”—agreeing on its shape—is anything but trivial and was a meaningful first step.<sup>31</sup> For this process, agreeing that all negotiation meetings would be held in New York City during the evening represented and symbolized the strong commitment on the part of the Albany-based NYPSC staff towards an inclusive process.

The discussions took place under the scrutiny of both press and politicians. Therefore, the tension between the confidentiality of the settlement process and the need for transparency for the many government parties to resolve issues of public importance, posed threshold issues for the ADR efforts. Addressing these issues meeting-to-meeting, rather than attempting to enforce an embargo on any public discussion of mediation effort proved useful in allowing the discussions to move forward.<sup>32</sup>

The thorniest issue in public policy dispute resolution is that of confidentiality, a hallmark of settlement theory and practice. The principle of *inadmissibility* of settlement offers is embodied in the Federal Rules of Civil Procedure.<sup>33</sup> At the NYPSC, the broader principle of *confidentiality* of negotiations is institutionalized in regulations of the agency.<sup>34</sup> At the same time, the

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31. See Andrew D. Seidel, *The Use of the Physical Environment in Peace Negotiations*, 32 POL. & DESIGN SYMBOLISM 19 (1978), available at <http://www.jstor.org/pss/1424284> (for a thoughtful exploration of agreeing on the shape of the table, evoking the international negotiations to end the war in Vietnam—at a round table).

32. The language of the NYPSC rule governing confidentiality of settlement discussions provides sufficient flexibility to encompass several approaches. Ultimately, the parties to the negotiations can establish the level of confidentiality to some extent, as long as the decision is unanimous. See N.Y. COMP. CODES R. & REGS. tit. 16, § 3.9(d) (2009) (providing that parties shall not disclose discussions, admissions, concessions and offers to settle “without the consent of the parties participating in the negotiations”).

33. FED. R. CIV. P. 68(b). The Federal Rules of Civil Procedure require that “[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs.” *Id.*

34. See N.Y. COMP. CODES R. & REGS. tit. 16, §§ 3.9(d) & (e) (2009) (discussing settlement and meditation respectively).

agency in developing the regulations, also had to ensure that parties and the public had early and effective notice that settlement negotiations were being commenced. Notice must be given once preliminaries are completed and the possibility of settlement is real. The NYPSC rules ensure notice to all active parties to the proceeding.

While the agency must ensure transparency and public accountability as much as possible, it also must ensure that the substance of negotiation sessions or offers to settle remains confidential.<sup>35</sup> Further, the Commission adopted an additional rule to guarantee protection of confidentiality by the mediator. The rule provides, in pertinent part:

[n]o discussion, admission, concession or offer to stipulate or settle, whether oral or written, made during any negotiation session concerning a stipulation or settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission” and that participating parties “shall hold confidential such discussions, admissions, concessions and offers to settle and shall not disclose them . . . without the consent of the parties participating in the negotiations.”<sup>36</sup>

Specifically as to mediators, NYPSC regulations provide that these confidentiality provisions “shall apply to a neutral and any agent or employee of the Department of Public Service participating in a mediated proceeding. A mediated proceeding is any process in which an alternative dispute resolution technique is used to resolve an issue in controversy, where a neutral may be appointed.”<sup>37</sup> The interpretation of these regulations is often a subject of dispute, especially where a sizeable community has been affected.

Parties to negotiations of this type frequently become divided on the interpretation of NYPSC regulations and make their divergent views known to the press and other media outlets. To deal

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35. In addition to the regulations protecting the confidentiality of settlement negotiations and mediations, section 15 of the Public Service Law makes it a misdemeanor for an employee of the Department of Public Service to divulge any confidential information. *See* N.Y. PUB. SERV. LAW § 15 (McKinney 2009).

36. N.Y. COMP. CODES R. & REGS. tit. 16, § 3.9(d) (2009).

37. N.Y. COMP. CODES R. & REGS. tit. 16, § 3.9(e) (2009).

with divergent interpretations, the parties can work together to develop an interpretation agreement that serves as workable guideline for confidentially requirements.

Another aspect of the contracting phase is to ensure that all parties understand the process. In a public policy dispute, the public itself is likely to be sitting at the table, sometimes in the form of community advocates with little experience in complex administrative proceedings, and with scarce resources for extensive participation. These advocates demand and need to know what a Joint Proposal is; what it means to agree to it; how it is binding; what will happen before the Commission; who has the right to oppose a Joint Proposal; and how a party can speak up in opposition if some but not all of the parties reach an agreement. Clarifying these questions at the commencement of negotiations, and developing the answers at every stage are key mediator functions.

Finally, the initial contracting phase is a decisive one for the mediator. Any successful mediation practice is based upon the development of a level of trust between the participating parties and the mediator. Unlike the presiding judge, the mediator has no inherent authority, as parties are under no obligation to settle or to engage with a mediator. Parties are always free to negotiate without a neutral and any party is free to walk away. While a court may require parties to sit down with a mediator, even repeatedly, a court cannot order the parties to settle. Therefore, the mediator earns a place at the table only by providing a service that the parties come to value.<sup>38</sup> If there is no added value, then there is no seat.

### **B. Bargaining in the Shadow of the Law<sup>39</sup>**

The mediation took place against the background of basic principles of public utility regulatory law. First, public utilities are generally not liable for consequential damages resulting from utility service problems or failures, and regulatory agencies have

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38. Expert mediators and teachers Linda Singer and Michael Lewis of the Washington, D.C. Center for Dispute Settlement sometimes force this precept home in their mediator training. The first task of each participant is to convince the parties they need a mediator, and that he or she is the one.

39. MNOOKIN ET AL., *supra* note 3, at 101-05.

authority over rates and service, but none to award civil damages or require equitable remedies.<sup>40</sup> Second, some, including Con Edison, have tariff provisions setting a level of compensation to customers for food spoilage in the event of outages of specified duration. Following the 2006 outage, that level was raised by a modest amount, and for maximum reimbursement, required documentation from the customer on perishables lost due to lack of refrigeration.<sup>41</sup> In addition, many residential customers received refunds of approximately \$3 representing a prorated credit for the days without electric service. This minimal compensation only further enraged many in the community.

A prudence review, however, is the classic hammer of utility regulators. Generally, a regulated utility is entitled to recoup rates of all its prudently incurred expenses, a process which includes a rebuttable presumption of prudence.<sup>42</sup> The standard for what is considered “prudent” is that the utility’s decisions and

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40. For example, the Commission can only recover a penalty or enforce its orders or regulations by bringing an action to seek a court order for doing so. N.Y. PUB. SERV. LAW § 24 (McKinney 2009).

41. The Commission increased the reimbursement for lost perishable food from \$150 to \$200, when residential customers produce an itemized list of losses; and from \$350 to \$400 when residential customers produce an itemized list and proof of loss. In addition, the Commission for the first time required utility reimbursement for losses of perishable medication. Total reimbursement per incident was capped at \$15 million. *See* Case 06-E-0894, N.Y. Pub. Serv. Comm’n, Proceeding on Motion of the Comm’n to Investigate the Electric Power Outages in Consolidated Edison Company of New York, Inc.’s Long Island City Electric Network, Order Concerning Tariff Provisions Governing Reimbursement for Food Spoilage 19-21 (Nov. 23, 2007) (on file with author).

42. The Public Service Law does not define “prudence.” The prudence doctrine arises from the broad general powers of the regulatory commission to establish just and reasonable utility rates that compensate utility shareholders for prudent or reasonable investment, and protect ratepayers from the burden of unreasonable management investment. *See* N.Y. PUB. SERV. LAW § 66(12) (McKinney 2009). The burden of proof ultimately lies with the utility seeking a change in rates. *See* N.Y. PUB. SERV. LAW § 72 (McKinney 2009). The prudence review power is described at length in *Niagara Mohawk Power Corp. v. New York Public Service Commission*,

[i]n the exercise of its rate-making power, the Public Service Commission may not deny a utility a reasonable rate of return on its investment . . . The opportunity to earn a fair return does not mean, however, that a utility will be permitted to include negligent or wasteful expenditures in its operating expenses.

*Niagara Mohawk Power Corp. v. Pub. Serv. Comm’n*, 507 N.E.2d 287, 291 (N.Y. 1987).

actions, under the circumstances at the time, were reasonable. The regulator is not entitled to apply the wisdom of hindsight to those actions and decisions. Should the regulator conclude, after a hearing, that the utility acted imprudently, then those costs incurred as a result of the imprudent action will be disallowed and the imprudent investment will be removed from the company's rates.<sup>43</sup> These costs, in other words, will be borne by the utility's shareholders, not its customers. This is the harshest remedy available to the regulator without judicial imprimatur, and its consequences can be costly to the utility.<sup>44</sup> However, it is not a remedy likely to afford comfort to any particular customer or group of customers, as the rate adjustment is spread across the entire customer base, and ends up as pennies on an individual's monthly bill.

These limited remedies are the only ones available to the regulator by law. The limitations themselves, however, created the conditions for parties to seek more satisfying forms of redress and resolution. To do so, they were forced to seek voluntary or consensus remedies. In other words, the limitations of utility law lower the BATNA for the parties seeking more meaningful or holistic concessions from the utility.

For those seeking redress against a utility, however, the possibility of a public finding by the regulator that a utility's conduct was imprudent may have a symbolic value all on its own. Parties had to assess the limitations of a litigated case and if the case proceeded to a litigated outcome, knowing that if the Commission were to find the company imprudent and reduce system-wide rates accordingly, no additional remedies would be available to community members. This is inherently a difficult balance to strike and can only be resolved by the addition of positive value on the side of the settlement.<sup>45</sup>

The mediation goal should be to assist parties in moving away from a purely distributive solution (a fifty-fifty split is the

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43. *See id.*

44. *See* Long Island Lighting Co. v. Pub. Serv. Comm'n, 523 N.Y.S.2d 615, 624 (App. Div. 1987) (noting that the prudence investigation into cost overruns during the construction of the former Long Island Lighting Company's Shoreham Nuclear Power Station resulted, after judicial review, in over \$600 million in prudence disallowances).

45. Or, as many mediators say, "It's a good idea to try to enlarge the pie before you start to slice it up."

paradigm) and towards a more lasting and profound resolution. This depends upon the parties identifying an objective standard of some kind, to move from a position-based to a principle-based negotiation.<sup>46</sup> In this case, the standard emerged as one of returning value to the community; value which had been reduced by the outage and its circumstances. Against this standard, a varied set of measures to return value began to emerge at the negotiating table, creating the conditions for execution of an agreement.

### C. Identifying the BATNA: What were Parties' Best Alternatives to Settlement?

A key February 2008 ruling by Administrative Law Judge Stockholm may have raised the utility's estimate of its exposure in the face of an ongoing and possibly expanded prudence review, as well as potentially increasing the utility's exposure to civil damages.<sup>47</sup> In July 2007, parties filed arguments and evidence intended to establish a prima facie case of utility imprudence, to shift the burden of production of evidence of prudence to the utility. The purpose of the ruling was to determine which of the numerous imprudence allegations levied by some parties against the utility required a response from Con Edison. In the judge's words, the question as to each imprudence allegation was "whether sufficient facts have been alleged and causal arguments posited that a reasonable person would require Con Edison to submit an affirmative case."<sup>48</sup> The judge reviewed each listed allegation, and upheld most allegations as requiring a Con Edison response. These were grouped, and included: (1) failing to have in place protocols or information systems to effectively assess distribution system conditions; (2) failing to adequately upgrade and maintain its Long Island City distribution system in the years leading up to the outage; (3) failing to have adequate

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46. FISHER & URY, *supra* note 6, at 83.

47. See Case 06-E-0894, N.Y. Pub. Serv. Comm'n, Proceeding on Motion of the Comm'n to Investigate the Electric Power Outages in Consolidated Edison Company of New York, Inc.'s Long Island City Electric Network—Prudence Phase, Ruling on Scope of Testimony, Schedule, and Discovery (Feb. 8, 2008), available at [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/0/7ED475CED8AD31A6852573E900770D0D/\\$File/06e0894\\_Ruling.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/0/7ED475CED8AD31A6852573E900770D0D/$File/06e0894_Ruling.pdf?OpenElement).

48. *Id.* at 5.

emergency preparedness plans; and (4) failing to take reasonable steps to reduce load before and during the outage.<sup>49</sup> As a result of this ruling, these issues were destined for trial.

In addition, the ALJ ruled that the Consumer Protection Board and the Attorney General raised a convincing argument that the company's actions should be measured against a gross negligence standard. A Commission finding that Con Edison was grossly negligent—rather than simply imprudent—could expand its liability<sup>50</sup> and would certainly damage its reputation for reliability. The judge concluded that the proceeding could include an examination of the company's actions against a gross negligence standard. This ruling could have lowered the utility's BATNA and concomitantly raised its willingness to add value onto the settlement side of the scale.

#### **D. The Execution: The Joint Proposal**

During the endgame phase, the negotiations are brought together to form a conclusion. The parties draft the language of the proposal itself, and each must decide whether or not to sign, to support, to remain silent, or to oppose. At this stage of negotiation of a long-lived settlement, it is axiomatic that there will be details impossible for the parties to foresee and plan for. At this point, not seeking agreement on all the implementation details, but instead seeking agreement on a process to resolve those implementation issues when they arise can avoid an eleventh-hour impasse and preserve the overall consensus. Also, equally important is the inclusion of a dispute-resolution mechanism.

The structure and administration of environmental benefit funding is a relevant example to look at. Instead of choosing the organization or administrator to manage funds and oversee tree planting and other energy-saving environmental projects, the parties agreed upon a mutually acceptable process for a choice to be made, but did not themselves make the choice at the time of execution of the Joint Proposal. In its order which adopted the

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49. *Id.* at 4-9.

50. Under certain circumstances, a Commission determination could have a collateral effect on a subsequent judicial proceeding on identical issues. See *Allied Chem. v. Niagara Mohawk Power Corp.*, 528 N.E.2d 153 (N.Y. 1988).

terms of the Joint Proposal, the Commission directed the parties to identify, for commissioners, the chosen administrator for tree planting and greening projects. The Commission reserved forty-five days to reject the choice. In fact, the process went, as anticipated, in the Joint Proposal and a Greening Administrator was selected, as well as an entity conducting the study.

Two years after beginning the outage investigation, the NYPSC adopted the material terms of the Joint Proposal.<sup>51</sup> The Joint Proposal was signed and supported by Con Edison, NYPSC Staff, the New York State Consumer Protection Board, Western Queens Power for the People, New York State Assembly Member Richard Brodsky, New York City, and the Public Utility Law Project. No opposing statements were filed with the NYPSC.

### **E. The Public Service Commission Adoption of the Joint Proposal Terms**

The specific terms of the Joint Proposal included the following. First, rate benefits were afforded to all Con Edison customers by disallowing the inclusion in the company's rates of \$40 million of costs incurred to replace and repair its delivery system. Additionally, Con Edison agreed not to seek recovery of \$6 million in associated carrying charges. In addition, Con Edison made available \$17 million in benefit funds for the communities directly affected by the Long Island City network outage. The \$17 million encompassed direct payments and bill credits including: (1) a bill credit of \$100 to each residential customer; (2) a bill credit of \$200 to each small business customer; (3) a bill credit of \$350 to each large business customer; (4) a payment of \$100 to each residential claimant; and (5) \$200 for each business claimant for food spoilage. It also included \$500,000 for a research entity (with a process for its selection by signatory parties) to study economic and health impacts of the outages. Of the roughly \$9 million remaining, one half was to be

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51. See Case 06-E-0894, N.Y. Pub. Serv. Comm'n, Proceeding on Motion of the Comm'n to Investigate the Electric Power Outages in Consol. Edison Company of N.Y., Inc.'s Long Island City Electric Network—Prudence Phase, Order Adopting Terms of Joint Proposal with Modifications (July 24, 2008), available at [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/0/A991CF5BB6DBE56F85257490004709B9/\\$File/303\\_06e0894\\_FINAL.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/0/A991CF5BB6DBE56F85257490004709B9/$File/303_06e0894_FINAL.pdf?OpenElement).

paid to a tree-planting organization (with a process to select it) for planting trees in affected communities, over and above New York City's tree-planting program (the One Million Trees initiative). The other half was to be paid to a Greening Projects Administrator (with a process for its selection) for other environmental initiatives, which "may include additional tree planting, the installation of measures that improve indoor or outdoor air quality, and other initiatives to improve the environment" within the community that suffered the outage.<sup>52</sup>

The Joint Proposal also required that Con Edison offer an apology—in English and Spanish—expressing the company's sincere regrets for the network power outage and its consequences, for its performance, and for the extended hardships experienced by its customers as a result.<sup>53</sup> In its review of the terms of the Joint Proposal, the Commission insisted the apology be signed by the utility's Chairman and Chief Executive Officer, and mailed separately to each customer, to which Con Edison agreed.<sup>54</sup> And in exchange for all of the above, the prudence investigation was terminated.

In its order adopting the Joint Proposal terms, the Commission noted that "[a]s all parties have recognized, these benefits would not be available in a Commission order, except with the consent of the parties . . . We expect the greening projects contemplated under the Joint Proposal to assist in improving energy efficiency and reducing demand, in part due to the cooling characteristics of adding trees and other greening projects in metropolitan areas."<sup>55</sup>

### AFTERWORD

On the issue of whether the value was returned, indications are that it was. As the study nears completion, the Greening Administrator has been selected and the payments and refunds have been received; none of which could have resulted from the prudence litigation. One of the community representatives to the negotiations reported that the morning after the Con Edison

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52. *Id.* at 3-4.

53. *Id.* at 4.

54. *Id.* at 8.

55. *Id.* at 7.

checks arrived in customers' mailboxes—two years after the outage—she was pleasantly surprised to step out of her elevator on the way to work and be greeted by a round of applause from her neighbors. Additionally, Con Edison recently announced a \$6 million, eighteen-month smart grid pilot in northwestern Queens, the same area that suffered from the 2006 outage. The pilot will test a state-of-the-art technological upgrade to significantly reduce electricity usage, and to monitor infrastructure problems, by empowering consumers to track and control their own energy use.<sup>56</sup>

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56. Simon Akam, *Con Ed Tests a 'Smart Grid' in Queens*, N.Y. TIMES, Aug. 5, 2009, available at <http://cityroom.blogs.nytimes.com/2009/08/05/con-ed-tests-a-smart-grid-in-queens>.