

**APPENDIX A**  
**PSC ORDER**

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Rochester on May 19, 2004

COMMISSIONERS PRESENT:

William M. Flynn, Chairman  
Thomas J. Dunleavy  
Leonard A. Weiss  
Neal N. Galvin

CASE 01-E-0377 - Joint Petition of Consolidated Edison Company of New York, Inc. and FSM East River Associates LLC for Authority under Section 70 of the Public Service Law to Transfer Certain Real Property Located at 616 First Avenue, a Portion of 685 First Avenue, 700 First Avenue and 708 First Avenue and for Related Relief.

ORDER APPROVING TRANSFER SUBJECT TO CONDITIONS

(Issued and Effective May 20, 2004)

BY THE COMMISSION:

SUMMARY

On March 19, 2001, Consolidated Edison Company of New York, Inc. (Con Edison) and East River Realty Company, LLC (ERRC; formerly known as FSM East River Associates LLC) filed a Joint Petition requesting approval, pursuant to Public Service Law (PSL) §70,<sup>1</sup> of the sale of four parcels of real property located at 616, 685, 700, and 785 First Avenue in New York City (the Properties) to ERRC. The Properties, which comprise approximately 9.2 acres, include the former Kips Bay Generating Station

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<sup>1</sup> This matter is also governed by PSL Article 4-A and approval under PSL §83 is required. Although reference to PSL §83 was inadvertently omitted from the documents related to the environmental review conducted in this proceeding, the omission is inconsequential because the provisions of PSL §§70 and 83 are the same for purposes of this proceeding.

site, a parking lot, the Waterside Steam Station site, and a former office building site, respectively.

The sale price ranges from approximately \$350 million to about \$680 million, depending on the level of rezoning approved by New York City for the Properties. The net proceeds resulting from the transaction will inure 100% to the benefit of Con Edison's ratepayers. While ERRC does not yet have a specific plan for the Properties, it generally intends to develop them with high-rise commercial and residential buildings.

In determining whether to approve this sale, we have considered many factors, including Con Edison's continued need for the property, the manner in which the property was auctioned, the price and terms of sale, potential environmental impacts arising from the proposed transaction, and the interests of Con Edison's ratepayers, the State, New York City and the local community. While we acknowledge that there could be some localized impacts resulting from approval of this transaction, on balance, we find that the benefits outweigh the impacts. Therefore, we conclude that, subject to certain conditions, the sale is in the public interest. However, because the total transaction costs and sale price are not known at this time, we are deferring consideration of the majority of the accounting and rate treatment issues until the transaction is consummated.

## BACKGROUND

### The Steam Plan

In accordance with our directives in Opinion No. 97-15,<sup>2</sup> Con Edison undertook a comprehensive examination of the operation, economics, and structure of its steam system. The objective of this examination was to develop plans to maintain the viability and reliability of the steam system while stabilizing steam rates. The utility's analysis was presented in two documents—the Steam System Plan and Steam System

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<sup>2</sup> Cases 96-S-1065 and 96-S-1121, Consolidated Edison Company of New York, Inc. – Steam Rates, Opinion No. 97-15 (issued September 25, 1997).

Plan Phase II Report (collectively, the Steam Plan). In Orders issued in 1998 and 1999, we considered these studies and approved the restructuring of the utility's steam system.<sup>3</sup>

One facet of the Steam Plan was to replace the output from Waterside by repowering the East River Generating Station (East River), which would have many beneficial effects. It would allow the utility to replace almost 100 year old generating equipment with modern, state-of-the-art equipment. The use of modern equipment would result in significant fuel savings for the utility and its customers, and it would benefit the local community, the City, and the State by reducing air emissions. As proposed in the Steam Plan, the new equipment would replace Waterside's steam output (2,400 Mlbs/hr) and add almost 300 MW of additional electric generating capacity within New York City.<sup>4</sup> In the Phase II Order, we authorized Con Edison to proceed with this project.

In 1999, Con Edison filed an application pursuant to PSL Article X for a certificate authorizing the ERRP. After a lengthy regulatory process, including an extensive investigation of the environmental impacts of the ERRP, two rounds of evidentiary hearings and numerous public statement hearings, the New York State Board on Electric Generation Siting and the Environment approved the application and issued an Article X Certificate for the project.<sup>5</sup>

A second facet of the Steam Plan was the divestiture of property owned by Con Edison in Manhattan but no longer needed for utility purposes. Three sites were so identified—616, 685, and 708 First Avenue. In 1998, Con Edison retained Cushman and

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<sup>3</sup> Cases 96-S-1065, *et al.*, *supra*, Untitled Order (issued October 19, 1998); Order Concerning Phase II Steam Plan Report (issued December 2, 1999) (Phase II Order).

<sup>4</sup> Over time, the design of the project changed. As certificated, the East River Repowering Project (ERRP) will produce 3,000 Mlbs of steam per hour and 360 MW of electricity (of which about 200 MW is incremental to Waterside's electric production).

<sup>5</sup> Case 99-F-1314, Application of Consolidated Edison Company of New York, Inc. for a Certificate of Environmental Compatibility and Public Need to Repower its East River Generating Station, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued August 30, 2001); Order on Rehearing (issued April 18, 2002).

Wakefield, Inc. (C&W) as its auction manager and commenced an auction for these properties. The utility also retained Merrill Lynch to provide a fairness opinion and evaluate C&W's recommendations. Con Edison and C&W soon determined that they could maximize the properties' value if the Waterside property was included in the divestiture. Whereas Con Edison initially proposed to divest East River and Waterside together, in the Phase II Report, Con Edison modified its proposal and recommended that it repower East River and sell Waterside with the other properties. This revised proposal would, according to the utility, provide the greatest benefits and lowest costs to its ratepayers and allow the Waterside property to be used for other, more productive purposes. The Phase II Report further concluded that a sale would produce significant proceeds that could be used to stabilize steam rates and offset various utility costs. Thus, in the Phase II Order, we allowed Con Edison to include the Waterside property in the auction.

#### The Auction Process

Con Edison and C&W developed a multiple stage bidding process for the Properties. In the first stage, all interested bidders would be invited to submit non-binding bids. After review of these bids, Con Edison and C&W would narrow the field of eligible bidders based primarily on price and ability to consummate the transaction. Additional rounds of bidding would then be conducted to obtain the highest price and most favorable terms of sale for the Properties.

In August 1998, the first phase was commenced. C&W sent preliminary information on the Properties and a confidentiality agreement to 151 prospective purchasers. These entities, which were selected on the basis of their reputations and past development experience, were offered the opportunity to participate in the auction process and the ability to receive more detailed information upon their execution of confidentiality agreements. Forty-one entities executed an agreement, received a detailed offering memorandum, and obtained access to due diligence materials related to the Properties (e.g., title reports and Phase I environmental surveys). First round bids were due in December 1998, and bidders were permitted to make offers for one or more of the

616, 685, and 708 First Avenue properties. At that time, the Waterside property was not included in the auction.

C&W received 19 bids. After evaluation of the bids and upon the advice of C&W, Con Edison made several changes to the process in order to obtain additional value. In addition to including the Waterside property, as described above, Con Edison created a two-tiered pricing structure that would provide for a guaranteed minimum price and an additional price payable upon successful rezoning of the Properties. In 1999, C&W commenced the second phase of the auction and invited 12 bidders to participate. Eleven of the bidders submitted second round bids; they made eight offers for three or four of the Properties and three offers for only one of the Properties.

The bids were analyzed, and, where necessary, clarifications were obtained from the bidders. Also, the bidders' financial qualifications and abilities to complete the transaction were again scrutinized. In the summer of 1999, four bidders were invited into the third round of the auction. In that phase, the bidders were asked to provide mark-ups to the draft transaction documents, and discuss any issues they had relating to the sale. They were also asked to provide revised, non-binding bids for the Properties.

Between September and December 1999, C&W, Merrill Lynch, and Con Edison reviewed the revised bid packages. They also advised Department of Public Service Staff (Staff) of the progress of the auction and outlined the parameters and possible value of the proposed deal. In December 1999, two bidders were selected to compete in a final round and asked to submit revised purchase offers with improved pricing terms and other conditions.

In January 2000, Con Edison selected ERRC as the winning bidder and entered into final negotiations with it on the price and terms and conditions of sale. These negotiations were successful, and Con Edison and ERRC executed an Agreement for the sale of the Properties on November 15, 2000 (the Agreement). The Agreement was amended on November 15, 2000, January 12, 2001, January 29, 2001 and February 26, 2001, March 16, 2001, and June 15, 2001 to address open issues, clarify certain terms and conditions of sale, and extend certain dates set forth in the Agreement.

The Petition

On March 19, 2001, Con Edison and ERRC filed a Joint Petition pursuant to PSL §70 for approval of the Agreement and proposed sale. The Petition, which includes four affidavits and other documents, describes the assets to be transferred, the purchaser, the ability of ERRC to consummate the transaction, the auction process, the transaction documents executed between parties, contracts related to the decommissioning of Waterside and environmental remediation of the Properties, the impact of the proposed sale on Con Edison's utility operations, Con Edison's proposed accounting and rate treatment for the sale, and the reasons that the transfer is in the public interest. Petitioners request approval of the transaction documents, a finding that the sale is in the public interest, recovery of all transaction costs and the costs associated with the decommissioning and remediation of the Properties, and approval of the proposed accounting, rate treatment and use of the proceeds.

The Purchaser

ERRC is a New York limited liability company formed to acquire and develop the Properties. The indirect owners of ERRC are the Fisher Brothers, Sheldon Solow, Morgan Stanley (through a real estate investment fund), and members of the Getty family (through trusts established for their benefit). The Fisher Brothers and Mr. Solow, who are the primary owners, are major real estate developers in New York City, each with over 50 years of experience. In accordance with the Agreement, ERRC has already provided almost \$100 million in deposits and letters of credit to Con Edison.

The Public Interest

Petitioners assert that the sale is in the public interest for several reasons. They claim that the sale will produce significant net proceeds that will inure to ratepayers' benefit. It will allow for economic development in, and increased tax revenues for, New York City via the reuse of the Properties for residential and commercial purposes. It will also provide rate stability and lower production costs for Con Edison's steam and electric customers. The development of the Properties, made

possible by the sale, could facilitate access to the waterfront, which is now blocked by the existing Waterside structures.

### The Transaction Documents

There are a number of agreements and contracts between Con Edison and ERRC that together constitute the terms and conditions of the proposed transaction. The principal document is the Agreement; other documents include letters of credit, assignment agreements, deeds, notes and pledge instruments. The Agreement delineates the terms and conditions of sale, pricing and the mechanism pursuant to which the final purchase price for each property will be determined, and the obligations imposed on Con Edison and ERRC.

#### A. Pricing

The Agreement presents a range of potential prices for the Properties that are dependent on, inter alia, when the closings occur, and whether and to what extent the Properties are rezoned. At the lower end of the range, the Agreement specifies a guaranteed minimum value of \$300 million for the Properties (\$150 million for the Waterside property and \$50 million for each of the other properties), payable within certain periods after completion of the environmental remediation required for each property.

If the Properties are rezoned, the price will be calculated based upon a formula of \$125 per square foot multiplied by the permitted zoning floor area plus \$50 per square foot for other revenue-producing space not included in the calculation of zoning floor area. Under this formula, and assuming a floor area ratio (FAR) of 12, which is the maximum permitted zoning density for the area, the purchase price would be approximately \$633 million. Upon execution of the Agreement, ERRC made a \$50 million payment to Con Edison that is considered additional to either the minimum price or rezoning formula. Thus, in total, ERRC could pay about \$683 million for the Properties.

The Agreement also provides a number of pricing alternatives that may be exercised by Con Edison or ERRC. For example, ERRC has a call option exercisable



after May 15, 2004 that specifies a purchase price of \$550 million plus adders based on the outcome of the rezoning application, and Con Edison, at its option, may terminate the Agreement if the aggregate rezoned price for the Properties is less than \$526 million. The pricing provisions also provide adjustments based on changes in market value if the closings do not occur by specified dates. In the event that Con Edison cannot convey the Waterside property for any reason, the prices for 685 and 708 First Avenue will be reduced.

B. Letters of Credit

ERRC provided two \$10 million letters of credit upon executing the Agreement, and a \$30 million letter of credit in September 2001. It must provide additional letters of credit over time to guarantee all or part of the purchase price for the Properties, as specified in the Agreement. Con Edison has the right to draw on the letters if ERRC cannot satisfy its obligations under the Agreement (e.g., due to bankruptcy) or upon the occurrence of certain specified events.

C. Rezoning

The Properties are, for the most part, zoned for manufacturing uses. The 685 First Avenue property, while zoned for commercial use, is subject to usage limitations imposed by the City. In order to maximize the value of and fully develop the Properties, they must be rezoned and the usage restriction lifted. The Agreement obliges ERRC, at its sole expense, to undertake these activities and obtain all approvals necessary to rezone and develop the Properties in the manner contemplated by the Agreement.

D. Environmental Remediation

Con Edison and its predecessors have used the Properties for utility purposes for many years, and preliminary testing and sampling indicate the presence of contamination by hazardous materials on all of them. Because ERRC intends to use the Properties, at least in part, for residential purposes, state and federal environmental laws require extensive remediation of the Properties. The Agreement specifies the companies' respective rights and obligations, financial and otherwise, related to the remediation work.

E. Other Provisions

The Agreement contains terms related to each company's representations and warranties, conditions to closing, termination and default, notice, and participation in regulatory proceedings. Each company is required to pay its own transaction costs. Con Edison is responsible for all transfer taxes, and ERRC is responsible for recording fees, letter of credit costs, and rezoning expenses.

F. Amendments

Con Edison and ERRC amended the Agreements six times. The First Amendment addresses potential delays in the completion of the environmental remediation work, relocation of certain Con Edison facilities within the Waterside property and the allocation of financial and other responsibilities for such work, the granting of easements on the Properties for remediation and construction work, and a number of other miscellaneous matters. The remainder of the amendments are letter agreements that extend the dates for ERRC to provide certain letters of credit and retain the services of a master planner.

Demolition and Remediation

The conditions precedent to the Agreement include the decommissioning of Waterside, demolition of the existing structures on 616, 700, and 708 First Avenue, and remediation of the contamination present on the Properties. Con Edison secured the services of TRC Companies, Inc., TRC Engineers, Inc. and TRC Environmental Corporation (collectively, TRC) to perform this work.

Con Edison entered into a contract with TRC that fixes the price for these activities at \$103.5 million (the TRC Contract). All work will be completed pursuant to Consent Orders issued by the Department of Environmental Conservation (NYSDEC) and in accordance with federal, state and local statutes, regulations, and requirements. The TRC Contract provides that TRC assumes responsibility for and certain liability associated with the physical and environmental conditions of the Properties and performance by certain deadlines of all demolition and remediation work. ERRC paid a

\$50 million deposit toward the cost of the contract, which deposit is returnable if the transaction is not consummated.

Con Edison and TRC have also secured cost cap and environmental insurance policies related to TRC's work. The cost cap policy protects Con Edison from cost overruns, TRC's default, and indemnification claims. The environmental policies protect Con Edison and ERRC from claims related to contamination on the sites and disposal of contaminated materials removed as part of TRC's work. The terms of the policies range from 10 to 30 years and have coverages between \$10 million and \$195 million, depending on the type of claim.

#### Accounting and Ratemaking Treatment

For purposes of estimating the accounting for the transaction, Con Edison has assumed that the Properties would be rezoned. The utility has calculated that the total purchase price, based on rezoning, would range from about \$583.0 million to \$689.7 million. To determine the net proceeds, the utility would first deduct the net book cost of the Properties, estimated to be \$178.5 million as of December 31, 2005. The utility would then deduct the cost of relocating electric feeders and steam mains located on the Properties, making environmental upgrades to its other steam plants resulting from the retirement of Waterside, the demolition activities at and environmental remediation of the Properties, site preparation and facility relocation costs associated with the sale, and community benefit programs it agreed to undertake as a condition to receiving its PSL Article X Certificate for ERRP. Finally, the utility would deduct its transaction expenses and federal, state, and local taxes on the sale. The resulting net proceeds are, according to Con Edison, in the range of \$121.9 million to \$181.3 million.

Con Edison proposes a specific allocation of the net proceeds for each of the properties among electric, gas and steam customers. The utility explains that 685 and 708 First Avenue have been treated as common plant, with their costs allocated among all three of its utility businesses. Therefore, it recommends that the net proceeds attributable to these properties be allocated using its common plant allocation ratios (electric - 66%, gas - 17% and steam - 17%). It further explains that 616 First Avenue was used only by

its electric (20%) and steam (80%) businesses, so the proceeds for that property should be allocated only to those businesses. Con Edison suggests that the allocation of the net proceeds attributable to the Waterside property be based on the electric and steam businesses' allocation of ERRP capital costs because it considers ERRP a replacement for Waterside, and Waterside could not be decommissioned or sold without ERRP.

Con Edison proposes to use the electric business' share of the net proceeds from the 616, 685, and 708 First Avenue properties to offset the portion of ERRP's capital costs allocated to electric operations. It proposes to use the gas business' share of the net proceeds to write down gas plant used to serve interruptible customers, and to use the steam business' share of the net proceeds to reduce the steam depreciation reserve deficiency and recover uncollected incremental revenues associated with increased steam rates approved in Opinion No. 00-15 but not put into effect until December 8, 2000.<sup>6</sup> Finally, it proposes to use the Waterside property's share of the net proceeds (both electric and steam) to offset the total capital cost of ERRP.

In comments submitted January 17, 2002, Con Edison modified its proposed use of the proceeds. It recommends that a portion of the net proceeds be used to pay for investments in energy infrastructure required after the World Trade Center disaster on September 11, 2001 to restore service in Lower Manhattan and to satisfy more stringent reliability requirements.

#### PUBLIC NOTICE

Notice of this matter was published in the State Register on April 18, 2001. Notices soliciting comments on the petition were also issued by the Secretary to the Commission in December 2001 and September 2002.<sup>7</sup> Further, the public and interested

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<sup>6</sup> Case 99-S-1621, Consolidated Edison Company of New York, Inc. - Steam Rates, Opinion No. 00-15 (issued December 1, 2000).

<sup>7</sup> Case 01-E-0377, supra, Notice Soliciting Comments and setting All Parties Meeting (issued December 5, 2001); Notice Soliciting Additional Comments (issued September 26, 2002).

parties were provided numerous opportunities to provide comments during the extensive environmental review process undertaken in this proceeding. The comments received during that process were summarized in Chapter 29 of the Final Generic Environmental Impact Statement (FGEIS) prepared in conjunction with this matter and will not be repeated here. To the extent the comments related to the environmental review, they were analyzed and addressed in the FGEIS. To the extent the comments relate to the sale price, use of the proceeds, and other issues related to the proposed transaction but not related to the environmental analysis, they will be summarized and discussed in this Order.<sup>8</sup>

### COMMENTS

The December 5, 2001 Notice asked parties to focus their comments on four issues: (1) whether the proposed sale should be approved based on the terms and conditions set forth in the Joint Petition and transaction documents or whether any modifications should be made; (2) when consideration of the allocation and use of the proceeds should occur; (3) for parties who believe the consideration of the proceeds should occur simultaneous with the consideration of the sale, recommendations as to the allocation and use of the proceeds; and (4) concerns parties may have with Con Edison's proposed accounting and rate treatment for this transaction. Initial comments were received from Con Edison, ERRC, the Office of the Attorney General of the State of New York (OAG), the City of New York (City), the County of Westchester (Westchester), Owners' Committee on Electric Rates, Inc. (OCER), New York Energy Buyers Forum (NYEBF), East River Environmental Coalition (EREC), East Midtown Coalition for Sensible Development (EMCSD), and Senator Martin Connor. Con Edison, OAG, City, Westchester, and OCER filed reply comments.

In response to the September 26 Notice, only EMCSD filed comments.

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<sup>8</sup> For convenience purposes, those comments are generally summarized in this Order.

Con Edison

Con Edison asserts that we should approve the sale because it is in the public interest for the reasons set forth in the Petition. The utility contends that its proposed method of allocation of the net gains is fair and equitable and that we should adopt its proposal at the same time as we approve the sale of the Properties. However, it states that it reassessed its proposals for use of the net gains in light of the unprecedented resources it needs for the restoration of the energy infrastructure in Lower Manhattan. Based on this reassessment, Con Edison proposes that we postpone our decision on the use of the net gains allocable to gas and electric customers from the sale of the three properties other than the Waterside site. Although the utility is seeking federal assistance for expenses relating to response and restoration efforts and infrastructure construction, it reports having difficulty in reliably estimating the amount of federal funds that will be forthcoming. To the extent that federal assistance is not provided for such expenses, the utility proposes to apply the net gains from the sale of the three properties to offset those expenses.

The utility continues to support use of the net gains allocable to steam customers to offset the steam system reserve deficiency and recover deferred uncollected steam revenues resulting from a delay in implementing rate increases authorized in Opinion No. 00-15. Further, the utility asserts that we should confirm these uses of the net proceeds at the time the transfer of the Properties is approved.

Con Edison claims that its proposal to use a portion of the net gains resulting from sale of the Waterside property to reduce the overall cost of ERRP is reasonable. It argues that application of the proceeds in this manner would further the objectives of the replacement of Waterside, specifically, minimizing electric and steam rates and eliminating the electric-to-steam subsidy associated with Waterside. This use of the net proceeds also recognizes that ERRP makes possible the sale of the Waterside property and realization of the sale proceeds.

In its reply comments, Con Edison states that there is no basis for the EREC argument against consideration of the issues raised in the notice prior to completion of a Draft Generic Environmental Impact Statement (DGEIS). The utility

asserts that the State Environmental Quality Review Act (SEQRA)<sup>9</sup> requires completion of the environmental review process before an agency takes action on the substantive issues in a proceeding, but that it does not preclude discussion of the substantive issues before completion of that process. It also states that the Notice makes clear that we will make a determination on the proposed sale only after completion of the SEQRA analysis and that EREC will have an opportunity to submit comments after completion of the DGEIS.

Con Edison states that there is no basis for Westchester's proposal that electric ratepayers are entitled to the full benefits of the net sale proceeds. Con Edison maintains that Opinion No. 00-15 unconditionally authorized the use of a portion of net gains to offset some or all of the steam system depreciation reserve deficiency and to recover deferred uncollected revenues. The utility disputes Westchester's claim that Westchester ratepayers will not benefit from use of a portion of the net proceeds to pay some of ERRP costs. The utility states that ERRP involves electric generation for its electric customers, including those who reside in Westchester County. It asserts that the consolidation of steam operations and increase in electric generating capacity will benefit Westchester County.

The utility argues that Westchester's suggestion that New York City ratepayers pay for the full costs of ERRP, and the City's proposal that only New York City customers benefit from the proceeds relating to the sale of in-City generation plants, are both baseless. Con Edison points out that we have long recognized the integrated nature of its system, which benefits all of the customers in its service territory, and routinely spread costs and benefits over all ratepayers.

Con Edison opposes OAG's suggestion to postpone a determination on use of the sale proceeds until Con Edison's next electric rate case. It points out that the ratepayers would obtain immediate benefits from a flow through of some of the expense reductions in the rate adjustment mechanisms in the utility's steam and electric tariffs.

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<sup>9</sup> Environmental Conservation Law (ECL) Article 8. The regulations implementing SEQRA are found in 6 NYCRR Part 7 and 16 NYCRR Part 617.

ERRC

ERRC states that approval of the transfer will result in substantial economic opportunities, redevelopment of the Properties as a mixed-use community, expansion of the area's public open spaces and recreational facilities, employment opportunities, and increased state and city tax revenues. It estimates a total effect on the New York State economy from construction in the range of \$3 to \$3.7 billion and from annual operations of \$156 million for the Residential Development Program to \$6.4 billion for the Mixed-Use Development Program.

ERRC asserts that a decision on the use of the proceeds is not necessary for us to make a determination that sale of the Properties is in the public interest. It endorses any procedures that will expedite our decision on the transfer, so that the New York City rezoning and other public review processes can begin.

In its reply comments, ERRC argues that, contrary to EREC's and EMCSD's comments, we may examine issues relating to a proposed property transfer prior to completion of the DGEIS. It believes that preclusion of comments on the proposed transfer before conclusion of the SEQRA process would lead to an absurd result.

ERRC states that we may wish to postpone the decision relating to use of the proceeds until relevant information becomes available, but that any postponement should not affect a decision relating to the transfer. It notes that we have delayed consideration of the accounting issues in other proceedings pending receipt of additional information.

Office of the Attorney General

OAG states that the amounts required to finance the reconstruction of Lower Manhattan after the events of September 11, 2001 and the funds available from insurance, government aid and other sources are not known at this time. It believes that the rate implications of the sale will remain uncertain for several years because the sale price cannot be properly determined until New York City acts on a petition for a zoning variance. Thus, it recommends that we approve the transfer and defer consideration of



the accounting and rate treatment to Con Edison's next rate case, as we have done in other cases. It suggests that we consider use of the net proceeds to offset the remaining Indian Point 2 Nuclear Generating Facility stranded costs. OAG notes our recognition in Opinion No. 00-15 of the subsidy provided by Con Edison's electric customers to its steam customers over the past 20 years and suggests that we consider the subsidy in any decision relating to use of the proceeds.

#### City of New York

The City has no objection to the sale of the Properties. It suggests that we delay deciding the accounting and ratemaking treatment of the sale proceeds, and the allocation of the costs among electric, gas and steam customers, until the costs relating to reconstruction of Lower Manhattan and to construction of ERRP are known. It requests, however, that we allocate any electric net gains not used for other purposes to New York City ratepayers, if we decide to end the policy of equalized full service electric rates between the City and Westchester County. The City argues that, if we make the decision to impose costs separately, it is fair to allocate only to the New York City ratepayers the benefits associated with Con Edison's in-city assets, such as the Properties.

In its reply comments, the City urges rejection of Westchester's proposal to allocate the steam portion of the net gains to electric ratepayers for the purpose of repaying an alleged subsidy from electric ratepayers. It states that since 88% of Con Edison's electric load is supplied to its New York City ratepayers, these ratepayers have supplied most of the alleged subsidy. It further questions the existence of the subsidy and states that these subsidies are in fact stranded electric costs, as described in Opinion No. 00-15. Further, the City notes that steam ratepayers will assume the costs associated with Con Edison's steam-electric plants once ERRP begins operation.

The City advocates dismissal of Westchester's claim that allocation of net gains to ERRP costs would result in another electric-to-steam subsidy and provide no benefit to Westchester electric ratepayers. The City states that ERRP provides benefits to Westchester electric ratepayers because the plant is needed to maintain electric system reliability and to serve electric load pockets. In addition, the City states that ERRP

benefits electric and steam customers because it replaces less efficient capacity and adds needed electric capacity to the system.

The City opposes Westchester's proposal to allocate the net proceeds before information relating to Lower Manhattan reconstruction costs becomes available. It points out that Con Edison's ratepayers are ultimately at risk for these costs and Westchester's proposal would result in a harmful "saw tooth" rate effect. It also states that it is premature to allocate immediately the net proceeds because sufficient information to make the decision is not yet available.

The City challenges Con Edison's assertion that we approved an allocation of net proceeds to offset a steam system depreciation reserve deficiency. It asserts that we explicitly refused to endorse that recommendation and referred the matter to this proceeding. The City recommends that we postpone our decision on use of the sale proceeds to offset the deficiency until we receive the results of the planned study establishing the amount of the deficiency. Further, it proposes that we postpone the allocation determination, including amounts dedicated to Lower Manhattan reconstruction costs, until the amounts of the costs are known.

#### County of Westchester

Westchester does not object to the sale of the Properties because redevelopment of the land is expected to produce economic benefits for the City. It does not believe there is any reason to postpone consideration of the accounting and ratemaking treatment for the sale's proceeds. However, it opposes Con Edison's proposed allocation and use of the net proceeds because it does not repair the injustice of past subsidies of the steam system by electric ratepayers. Westchester argues that, during the past 25 years, the common costs of the combined steam and electric facilities were assigned to the electric system and only incremental costs (fuel, processing charges and interdepartmental rents) were apportioned to the steam system. It proposes that we take this into account when deciding upon the allocation of the net gains. Westchester County further contends that \$75 million in accelerated depreciation annually approved for

Waterside and the 74<sup>th</sup> Street plant in Con Edison's electric rate plan constitutes an additional subsidy to the steam system.

Westchester opposes the use of the net proceeds from the sale of three of the Properties, excluding the Waterside property, to pay for ERRP capital costs. It asserts that failure to direct these proceeds to the electric system would deprive Westchester electric ratepayers of a fair share of the benefits from the sale of the Properties and result in a second subsidy of the steam system because the main purpose of ERRP is to provide steam.

In its reply comments, Westchester believes that its residents should receive substantial benefits from the net proceeds through an allocation of the majority of the proceeds to Con Edison's electric system. Thus, it strongly opposes the City's argument in favor of allocating the proceeds to New York City ratepayers and depriving Westchester ratepayers of an equitable share. Westchester argues that Westchester ratepayers contributed to the acquisition and maintenance of the Properties and that responsibility for liabilities associated with New York City assets are recovered from Westchester ratepayers. It also maintains that Con Edison and ERRC acknowledge that New York City customers will receive the primary benefit from ERRP's additional electric capacity and associated economic development and additional tax revenues.

#### Owners' Committee

OCER contends that rate stability for steam service is heavily dependent upon an allocation of the sale proceeds to offset ERRP costs. It refers to Commission decisions to provide net benefits to steam customers after ERRP is operational and to rule out the immediate elimination of the subsidy for steam from electric ratepayers. Thus, OCER urges us to approve the proposed transfer upon the terms and conditions set forth in the Petition, without adoption of Con Edison's proposal to set aside some of the proceeds for payment of costs relating to reconstruction of Lower Manhattan.

In its reply comments, OCER opposes Westchester's proposal to use the sale proceeds to replace the electric ratepayers' subsidization of steam costs. It states that we decided against this proposal in Opinion No. 00-15 because it would reduce electric

rates by only 1% while increasing steam rates by 20%. Specific to ERRP costs, OCER notes that we examined the subsidy issue in Opinion No. 00-15 and acknowledged that, because electric customers would require the ERRP capacity and incur its costs to serve load pockets even if steam was not produced, there is no subsidy related to that plant.

OCER opposes OAG's recommendation to delay a decision on the accounting and rate treatment for the sale. It also criticizes OAG's recommendation to consider the electric-to-steam subsidy in allocating the net sale proceeds. It maintains that the suggestion ignores our findings in Opinion No. 00-15 that the steam system provides benefits to electric customers, including reductions in electric market prices and electric transmission and distribution costs, and that the proposed Waterside retirement and property sale and ERRP operation will produce rate stability benefits and limit the steam-to-electric subsidy.

OCER agrees with the City's recommendation to allocate all electric net gains to New York City ratepayers, if we decide to change our policy of equalizing full service rates between New York City and Westchester County. It disagrees with the City's proposal to delay decisions on allocation of the net sale gains until information on the costs of reconstruction of Lower Manhattan and ERRP are known. OCER asserts that inclusion of Lower Manhattan reconstruction costs may compromise the rate stability benefits discussed in Opinion No. 00-15 that depend upon retirement and sale of Waterside and commencement of ERRP's operation.

#### New York Energy Buyers Forum

NYEBF favors the proposed sale of the Properties and supports use of the sale proceeds allocated to electric customers to pay some of the costs related to construction of ERRP.

#### East River Environmental Coalition

EREC protests consideration of the substantive issues in this case before the DGEIS is completed because it believes that SEQRA requires completion of environmental review before any request for comments on substantive issues. It reasons

that SEQRA directs environmental review prior to an agency decision, that decisionmaking includes participation by an informed public, and that the DGEIS provides necessary information to the public to make decisions on the substantive issues.<sup>10</sup> Thus, it concludes that concurrent consideration of substantive issues and environmental review circumvents SEQRA.

East Midtown Coalition for Sensible Development and Senator Martin Connor

EMCSD and Senator Connor support the use of a portion of the sale proceeds to pay for improvements in the community located near ERRP to minimize the environmental and health consequences of the plant's operation, including open recreation space and access to the waterfront. They support use of federal emergency funds to rebuild the Lower Manhattan infrastructure and question the nexus between rebuilding the downtown infrastructure and the disposition of the Properties.

EMCSD opposes our solicitation of comments on the disposition of the net proceeds for procedural reasons. First, it claims a lack of proper notice because it filed for active party status and was not included on the active party list posted on the Department of Public Service Web site and because its attorney and consultant provided testimony at an earlier scoping session and did not receive copies of the notice. It also asserts that only some parties listed on the active party list received formal notice and some of these parties received the notices a week or less in advance of the noticed conference. Second, it strongly believes that no comments on the substantive issues may be requested before completion of the environmental analysis. It asserts that a DGEIS will identify issues that are integrally related to the disposition of the proceeds of the Properties.

In comments filed in response to the second Notice, EMCSD contends that the public lacks enough information to provide substantive comments on the transaction. It claims that the technical conferences conducted in this matter did not fully address the

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<sup>10</sup> EMCSD filed a supplemental letter dated January 14, 2002 containing the same argument.

utility's proposal for allocating or utilizing the net proceeds. It asserts that additional discussions among the parties, and public hearings in the community, are necessary before the record on this issue can be completed.

As to the use of the proceeds, EMCSD recommends that they first be used to upgrade the existing portion of East River to bring it into compliance with applicable environmental laws. Remaining funds should be used to provide public open space and other amenities in the area around the Properties. Finally, it believes that ERRP will be a merchant plant outside our jurisdiction, and that no portion of the proceeds should be applied to the costs of that project.<sup>11</sup>

### Public Comments

The majority of the comments we received during the public statement hearings and the SEQRA process related specifically to the draft environmental impact statements. However, we received some comments on issues related to the manner in which we will consider the Petition and how we will use the resulting proceeds. Those comments were not considered in the FGEIS but are properly considered here.

Some commentators assert that we should not base our public interest determination solely on the price to be paid by ERRC for the Properties and the rate impacts and benefits associated with the sale. Rather, we should be guided by land use planning principles and consider the potential impacts of the development of the Properties (FGEIS, Chapter 29, Comment 2). Other commentators said that we should evaluate the benefits of the sale for individual ratepayers, and address use of the sale proceeds and their impacts on Con Edison's revenues (FGEIS, Chapter 29, Comment 8). Further, some recommend setting aside a portion of the proceeds to pay for mitigation measures, including off-site open space, a new school, and historic restoration (FGEIS, Chapter 29, Comment 195).

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<sup>11</sup> This understanding of the status of ERRP is erroneous. It will be a fully regulated generating facility, not a merchant plant. Its prudent costs will be included in the utility's rates and its benefits will inure to the ratepayers, not the shareholders.

STATE ENVIRONMENTAL QUALITY REVIEW ACT FINDINGS

In accordance with SEQRA, we have conducted a comprehensive environmental review of the proposed transfer and reasonably foreseeable impacts that could result from the sale. As part of this review, we prepared and adopted an FGEIS identifying and analyzing the potential impacts and mitigation measures therefor. Because ERRC has not yet proposed a specific development plan for the Properties, the FGEIS considered certain hypothetical scenarios for development of the Properties, and assessed the reasonable range of their impacts. We find that the analyses and conclusions contained in the FGEIS are reasonable and appropriate and incorporate them into the following findings.

Proposed Action

For purposes of the environmental review, we defined the “Proposed Action” as consideration of the proposed sale of the Properties by Con Edison to ERRC under PSL §§70 and 83. Pursuant to the Agreement, it is reasonably foreseeable that ERRC would, with our approval of the sale, seek to rezone and develop the Properties with a combination of high rise residential and commercial buildings. In particular, the Agreement requires ERRC to seek approvals that would permit a commercial and residential FAR of 12 on the Properties. Therefore, in accordance with 6 NYCRR §617.3(g), our SEQRA review encompassed the potential impacts resulting from a range of development proposals.<sup>12</sup>

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<sup>12</sup> The analysis was generic in nature. Once ERRC creates a specific development plan for the Properties, it will apply to the appropriate City agencies for the requisite approvals. As part of that approval process, further environmental and land use review will be conducted.

Procedural Setting

The procedural history of this matter was discussed in our January 30, 2004 Order.<sup>13</sup> For contextual purposes, a brief summary is provided here.

On April 12, 2001, Con Edison and ERRRC filed an environmental assessment form and a draft scope of work for a GEIS to be prepared in conjunction with our consideration of the proposed transfer. On May 9, 2001, we declared the Commission lead agency, issued a positive declaration of significance, formally commenced the environmental review in this proceeding, and announced that we would conduct formal scoping for the GEIS. Over the next four months, we solicited and analyzed parties' and the public's comments on the scope of work for the GEIS. To facilitate the public's involvement in the process, four public statement hearings were conducted and the public was able to provide comments in writing, electronically, and telephonically on our opinion line. By Order issued September 6, 2001, we approved the Final Scope of Work and directed Petitioners to prepare and file a DGEIS.

On June 17, 2002, Petitioners filed a DGEIS. By Order issued June 24, 2002, we accepted the draft as complete and directed that it be issued it for public comment. In order to maximize public involvement in the process, the comment period was held open for more than three months and the public was given the same options as identified above for providing comments. Based on the comments received and announcements of other projects in the immediate area of the Properties, Petitioners determined that additional environmental analysis would be necessary and prepared a supplemental DGEIS, which they submitted on May 16, 2003. By Order issued May 23, 2003, we accepted it as complete and directed that it be issued for public comment. Over the subsequent two month public comment process, the same methods as described above were used to maximize public involvement.

By Order issued January 30, 2004, we adopted and issued an FGEIS for this matter. The FGEIS incorporated the DGEIS and supplemental DGEIS, the

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<sup>13</sup> Case 01-E-0377, supra, Order Adopting and Approving Issuance of Final Generic Environmental Impact Statement (issued January 30, 2004).



comments received, the analysis of and response to the comments received, and other information identified therein.

### Hypothetical Development Scenarios

Because ERRC has not proposed specific plans for the Properties, the FGEIS presented two different “reasonable worst-case” Development Scenarios: an As-of-Right Scenario and a Rezoning Scenario. The As-of-Right Scenario examined a development program that could reasonably be expected to occur without any additional discretionary governmental actions. Under the Rezoning Scenario, the FGEIS examined a range of different illustrative development programs: a Residential Program (which maximized the residential use reasonably expected to occur); a variation of the Residential Program in which it was assumed that 20% of the rental apartments would consist of assisted units under the “80/20 Program;” a Mixed-Use Program (which maximized the commercial use reasonably expected to occur); and a variation on the Mixed-Use Program in which the office use would be sited on 708 First Avenue. Each of the development programs included a hypothetical design which formed the basis for the analysis of potential impacts on urban design, open space, shadows and neighborhood character. The Development Scenarios are identified and described in detail in the FGEIS.

### Identification of Significant Impacts

The FGEIS examined the potential for significant impacts resulting from the Proposed Action and illustrative Development Scenarios in the areas of: land use; zoning and public policy; socioeconomic conditions; community facilities; open space; shadows; historic and archaeological resources; urban design and visual resources; neighborhood character; hazardous materials; infrastructure, solid waste and energy; traffic and parking; transit and pedestrians; air quality; noise; coastal resources; and construction impacts. Because the development would take place over a period of years, the analyses were conducted for two build years: 2007 and 2011.

With respect to land use, zoning and public policy, socioeconomic conditions, historic and archeological resources, hazardous materials, infrastructure, solid waste and energy, parking, and coastal resources, the FGEIS found that no significant impact would result from the Development Scenarios. We therefore adopt those findings. Potentially significant impacts were identified in other environmental areas. These impacts are discussed at length in the FGEIS and are summarized below.

A. Community Facilities

The analysis contained in the FGEIS found the potential for an increase in crowding in the elementary schools in the vicinity of the Properties and in School District 2 as a whole. These impacts could occur with or without assisted housing, although the number of additional students would be highest with the “80/20” variation of Residential Development Program. Under that program, significant impact to public day care centers would also occur.

B. Open Space

The FGEIS assumed that approximately 3.3 acres of public open space, programmed for a combination of active and passive recreational uses, would be provided under the Rezoning Scenario. Within the ¼-mile study area examined in the FGEIS, there is the potential for a temporary significant impact under the Mixed-Use with Office on 708 First Avenue Development Program in 2007. In addition, in 2007, the As-of-Right, Residential, and both Mixed-Use Development Programs would reduce some open space ratios that are already below New York City Department of City Planning (NYCDCP) guidelines, and could therefore have a quantitative impact on open space resources in the ¼- and ½-mile study areas. By 2011, almost all open space ratios would improve over No-Action conditions,<sup>14</sup> and the temporary significant impacts of the Mixed-Use with Office on 708 First Avenue Development Program would be mitigated by the provision of open space associated with development of the Waterside property. However, the As-of-Right Scenario and the Mixed-Use Development Program would

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<sup>14</sup> The “No-Action” Alternative assumes that Con Edison neither sells nor develops the Properties, but that it does demolish the structures on and remediate the Properties.

slightly reduce the combined worker/residential passive open space ratio in the ¼-mile area, which could have a quantitative impact on open space since the ratios would continue to be below NYCDCP guidelines. Given the addition of open space on the Properties by 2011, whether or not there would be significant impacts depends on the quality of the open space that would be provided, as discussed below.

Absent a specific project design, the quality of the open space resources and the related effect of the Development Scenarios on the open space conditions in the ¼- and ½-mile study areas could not be fully addressed. Accordingly, significant impacts cannot be ruled out. Final open space design plans would be developed in consultation with NYCDCP and the New York City Department of Parks and Recreation. If the open space resources included within ERRC's specific plan for the Properties meet the assumptions in the FGEIS, no significant qualitative open space impacts would occur.

We find that, in the event ERRC provides sufficient high-quality open space, significant adverse impacts to open space would be avoided. In the event that ERRC's specific development plan does not include open space in sufficient quality or quantity, significant impacts to open space would result.

C. Shadows

Following the guidelines contained in the CEQR Technical Manual, the shadows assessment in the FGEIS considered the shadow increments that may be cast on sensitive receptors—specifically, public open spaces, historic resources with significant sun-sensitive features, and important natural resources—by the buildings that could be constructed as a result of the Development Scenarios. The FGEIS identified significant shadow impacts on Tudor City's open spaces, which could be caused by the shadows of building envelopes. The exact extent and duration of shadows on this resource and on each of the other open space and historic resources identified in the FGEIS must be confirmed by an analysis of the specific building envelopes to be included in ERRC's specific project plan.

D. Urban Design and Visual Resources

To the extent that the urban design characteristics of the specific development plan for the Properties are consistent with those of the illustrative plans and

the guidelines in the CEQR Technical Manual, significant impacts would not occur. However, should the urban design characteristics be different in a way that conflicts or is inconsistent with the study area, significant impacts to urban design and/or visual resources could occur. Because detailed depiction of the arrangement and design of the buildings is necessary to determine the probable effects on urban design, and because this generic review examines types and ranges of development programs rather than a specific plan for the Properties, it is not possible at this point in the process to determine whether the specific development plan will have a significant impact on urban design and visual resources would occur.

E. Neighborhood Character

To the extent that ERRC's specific development plan for the Properties is consistent with the hypothetical scenarios considered in the FGEIS, significant impacts on neighborhood character are not expected. However, if such plans are inconsistent with those scenarios, significant impacts on neighborhood character could occur. In addition, the combined impacts from construction activities of the various projects planned in the vicinity of the Properties could generate temporary significant cumulative impacts on neighborhood character, depending on the duration and character of the overlapping construction periods.

F. Traffic

The FGEIS examined the effects of the Development Scenarios in two study areas: the "Initial Study Area" which consisted of 66 intersections in the area generally bounded by the FDR Drive service road on the east, Third Avenue on the west, 42nd Street on the north, and 34th Street on the south, plus additional locations further west along 34th and 42nd Streets and further north and south along First and Second Avenues; and the "Expanded Study Area" which consisted of 13 additional intersections north of the Initial Study Area and nine intersections west of the Initial Study Area, plus the FDR Drive. The FGEIS found that all of the Development Scenarios would result in significant increased traffic volumes and would create significant traffic impacts at 8 to 23 intersections in the Initial Study Area. An additional number of intersections, ranging from 9 to 15, would be significantly affected in the Expanded Study Area. The FGEIS

identified that cumulative traffic impacts could also occur as a result of the simultaneous construction of a number of projects in the East Midtown area (e.g., construction of the FDR Drive rehabilitation project, the Second Avenue Subway, and the United Nations Development Corporation (UNDC) Building, in addition to the development of the Properties).

G. Transit and Pedestrians

Increased subway trips resulting from the Development Scenarios would result in significant adverse impacts to the PL9 staircase at the Flushing Line (7 Train) entrance to Grand Central Terminal. Under certain scenarios, significant impacts could also result to the P18 staircase leading from the Grand Central Terminal mezzanine level to the downtown Lexington Avenue Line platform, as well as to the ML1-ML5 mezzanine stairway at Grand Central Terminal. In addition, new bus trips would result in crowding on the M42 and M104 buses during peak hours. Increased pedestrian trips associated with the Development Scenarios would also result in significant impacts at up to five crosswalks and corner reservoirs along East 42nd Street, East 39th Street, and First Avenue during peak hours.

H. Air Quality

In the absence of a final design, significant impacts from emissions of  $PM_{10}$ ,  $NO_2$  and  $SO_2$  from garage facilities and heating, ventilation and air conditioning (HVAC) systems may occur. The increase in 24-hour average  $PM_{2.5}$  concentrations from the HVAC systems associated with the Development Scenarios, when added to monitored background levels, would yield total predicted  $PM_{2.5}$  concentrations that are less than the applicable 24-hour National Ambient Air Quality Standard (NAAQS). However, the maximum potential increase in 24-hour average  $PM_{2.5}$  concentrations on the upper floors of the Properties would be greater than the interim guidance criterion utilized by the New York City Department of Environmental Protection (NYCDEP).

The FGEIS examined the effects of existing emissions from the Queens Midtown Tunnel (QMT) ventilation shaft upon the buildings that would be constructed under the Development Scenarios. The results of the modeling identified that the existing emissions would not cause  $PM_{2.5}$  concentrations in the area of the buildings to increase by

more than the NYCDEP's interim guidance criteria. However, the modeling also identified that exceedances of the interim criteria would occur at certain elevated locations at 708 First Avenue. The actual concentrations at 708 First Avenue would likely fall somewhere between the range of values computed under the two modeling approaches. Based on the modeling and existing monitored data, the total 24-hour maximum predicted concentrations at those locations would not exceed the NAAQS, but the annual standard would be exceeded by background conditions. It is unclear to what extent, if at all, the NYCDEP interim guidance criteria should be applied to the introduction of a new population to an area which has background concentrations of PM<sub>2.5</sub> that are higher by virtue of proximity to a nearby source—the QMT ventilation building. Accordingly, PM<sub>2.5</sub> emissions from the QMT could have significant impacts on development of the Properties.

I. Noise

Applying the methodology specified in CEQR Technical Manual, the FGEIS identified the potential for significant noise impacts within certain interior areas of the buildings to be constructed under the Development Scenarios that would face the FDR Drive Service Road and East 35th Street.

J. Construction Impacts

Construction activities would at times be disruptive to the surrounding area, residents and users of nearby buildings and open spaces. Although construction would occur over several years, most of the disruptions would be temporary and would not occur for the entire construction period. Based on the foregoing, we find that construction, in itself, would not create significant adverse environmental impacts. In terms of potential cumulative construction impacts from various projects in the area, if several projects were under construction at the same time for long periods, there would be a greater potential for temporary significant cumulative impacts resulting from an area-wide deterioration of conditions (i.e., access, congestion, truck travel, noise, vibration, and visual aesthetics).

Mitigation

A. Generic Mitigation Subject To Future Refinement

Because ERRC has not formulated a specific development plan for the Properties, the FGEIS identified and analyzed the effects of categories of mitigation measures. When ERRC prepares and files its specific plan and rezoning application with NYCDCP and other City agencies, additional environmental review will be required, with NYCDCP or another agency assuming the role of Lead Agency. That future Lead Agency must examine the potential impacts of the specific plan, within the context of the FGEIS. It is required to adopt, and direct ERRC to implement, specific mitigation measures from the alternatives set forth in the FGEIS and summarized below, or such other or additional measures it deems appropriate, to avoid or minimize adverse impacts to the extent practicable. It should select appropriate mitigation measures based on the details of ERRC's development proposal for the Properties, including, but not limited to, the mix of residential and commercial floor area, the site plan and design of the buildings, and the timing of construction. In addition, the background conditions that exist at the time ERRC seeks rezoning and other local approvals will be relevant to those determinations.

The exceptions to this approach are mitigation for the As-of-Right Scenario and for certain of the topic areas discussed below, for which appropriate mitigation, or partial mitigation, is specifically imposed pursuant to these findings. As to the latter category, the mitigation measures discussed below may be comprehensive or incremental to measures that the future Lead Agency requires when it considers ERRC's specific development plan for the Properties.

B. Generic Mitigation Measures

1. Community Facilities

Mitigation to address the significant impacts to schools may include one or more of the following measures: (a) adjusting attendance zones within District 2 to improve the affected schools' composition and utilization to achieve greater capacities at the elementary school level; (b) re-programming existing seats at the intermediate or high school levels to achieve greater capacities at the elementary school level; and

(c) constructing additional capacity in District 2 for elementary school students generated by development at the Properties. As to the last option, the increased capacity could be achieved by building a new school, expanding an existing school, or creating space for the lower elementary grades on the Properties or in leased space elsewhere in the district.

Mitigation for day care impacts may include one or more of the following measures: (a) provision for an on-site day care center; (b) provision of a suitable location for a day care center off-site within a reasonable distance; and (c) expansion of an existing facility to mitigate the day care impact. The specific measures selected by the future Lead Agency should be developed in consultation with the New York City Administration for Children's Services and the Agency for Child Development.

## 2. Open Space and Recreational Facilities

To avoid or limit significant adverse impacts on open space, mitigation may include one or more of the following measures: (a) provision of new public open space on the Properties of the type and quantity needed to serve the proposed population and to offset any loss of existing open space ratios in the study area; (b) provision of new public open space elsewhere in the study area of a type appropriate to serve the needs of the added population; and (c) improvement of existing open spaces in the study area to increase their utility, safety, and capacity to meet identified needs. The future Lead Agency, and ERRC, should specifically consider upgrading the waterfront esplanade adjacent to the Properties; doing so would satisfy a number of concerns raised by the public and is consistent with the City's Waterfront Revitalization Program.

## 3. Shadows

Mitigation to address significant shadow impacts may include one or more of the following measures: (a) orientation of building bulk on each property; (b) enhancement of the open space resource significantly affected by shadows that would be cast from the proposed development (e.g., landscaping or programming features of one or more of the existing open space resources identified in the FGEIS, including the creation of substitute features in existing open spaces); (c) creation of new on-site public open spaces or other public amenities which have sufficient sunlight; and (d) adjustments to the shape and dimensions of building envelopes. Additional mitigation measures that



may be considered by the future Lead Agency include the creation of open spaces and access, vehicle and pedestrian circulation, aesthetic effects, and engineering constraints.

4. Urban Design and Visual Resources Mitigation

Should the future Lead Agency identify impacts to visual resources or urban design arising from ERRC's specific development plan for the Properties, it shall require ERRC to revise, to the maximum extent practicable, its proposed design to increase compatible streetscape elements and arrange buildings to improve views of visual resources.

5. Neighborhood Character

Any impacts on neighborhood character that may result from the development of the Properties would be mitigated by the measures required herein with respect to the mitigation of impacts on community facilities, urban design and visual resources, shadows, traffic, transit and pedestrians, and construction.

6. Traffic

Mitigation of significant traffic impacts may involve the following or similar measures: (a) signal phasing and/or timing changes; (b) parking regulation changes (*i.e.*, "daylighting" the approach to gain a travel lane at key intersections); (c) channelization improvements; (d) pavement markings and signage modifications; and (e) strict enforcement of posted traffic and parking regulations. Should circumstances at particular intersections warrant doing so, ERRC shall work closely with the appropriate City agencies to develop and implement other mitigation measures such as improved coordination and communication of traffic enforcement agents<sup>15</sup> to reduce the spillback through Second Avenue intersections near the portal of the QMT resulting in "lost" signal time (*i.e.*, green signal time that cannot be used effectively by moving traffic due to standstill or near-standstill conditions). ERRC shall also request that the New York City Department of Transportation (NYCDOT) post signage to encourage motorists to make more effective use of both right turn lanes along northbound Third Avenue at 36th

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<sup>15</sup> Deployment of such agents falls within the New York Police Department's (NYPD) jurisdiction.

Street en route to the QMT. If these mitigation measures are effective, the significant impacts at those locations would be fully mitigated. If such measures are ineffective, there could be the potential for significant unmitigated (or only partially-mitigated) impacts.

ERRC shall further request that the NYCDOT relocate eight diplomat curb parking spaces located on the south side of 39th Street approaching Third Avenue to another location. Should a suitable location not be identified, significant traffic impacts at the intersection of Third Avenue and 39th Street would not be mitigated.

In order to mitigate the cumulative impacts of possible simultaneous construction of the Second Avenue Subway, the UNDC Building, the FDR Drive rehabilitation project and development on the Properties, ERRC should seek to participate in the Interagency Traffic Task Force to be organized by the Metropolitan Transportation Authority and New York City Transit (MTA/NYCT) to develop, implement, and monitor a comprehensive traffic mitigation plan for the affected area.

7. Transit and Pedestrian

Mitigation of the potentially significant impacts on transit and pedestrians may include implementation of the following improvements, facility alterations and operational measures, undertaken in cooperation with appropriate agencies:

(a) widening of the PL9 platform staircase at the Flushing Line (7 Train) entrance to Grand Central Terminal; (b) creation of additional capacity near the P18 staircase leading from the Grand Central Terminal mezzanine level to the downtown Lexington Avenue Line platform by reopening the P16 staircase; (c) modification of the operation of the two escalators adjacent to the ML1-ML-5 mezzanine stairway at Grand Central Terminal to operate both escalators downward during the PM peak period, in order to increase entering capacity during that period; (d) expansion of service on the M42 and M104 routes during peak hours, by adding 1 to 12 standard 60-passenger buses to supplement existing service in the peak hours, or by replacing existing buses with articulated vehicles; (e) relocation of the cross-town bus stops at Second Avenue along East 42nd Street and East 34th Street as necessary in order to avoid construction zones during

construction of the Second Avenue Subway; and (f) widening of cross walks, modification of signal timing and removal of corner obstructions.

8. Air Quality

i. Mobile Sources

Development of the Properties should not result in any violations of the CO standard. However, there could be de minimis impacts at up to three receptor sites for the Residential and Mixed-Use Development Programs. While these impacts are not considered significant under the guidelines contained in the CEQR Technical Manual, examination of mitigation is still called for under the New York State Implementation Plan (SIP). Applying the range of network and intersection improvement measures presented in the traffic mitigation section would mitigate these de minimis air quality impacts.

ii. Stationary Sources (HVAC Systems and Garage Emissions)

ERRC shall prepare and file with the appropriate City agencies detailed air quality studies associated with its specific development plan that identify and discuss potential impacts from PM<sub>10</sub>, PM<sub>2.5</sub>, NO<sub>2</sub>, and SO<sub>2</sub> emissions associated with HVAC systems. If significant impacts associated with PM<sub>10</sub>, NO<sub>2</sub>, and SO<sub>2</sub> emissions are identified, they shall be mitigated by the proper design and placement of mechanical systems. If significant impacts associated with PM<sub>2.5</sub> emissions are identified, they shall be mitigated by one or more of the following: (a) appropriate location of stacks; (b) sealing of select windows on the upper floors of a new building where significant impacts are predicted to occur; (c) appropriate location of air intakes; (d) location of vents, where practicable, at the top of the tallest buildings in the program; and (e) use of natural gas or steam energy sources.

Significant impacts from garage facility emissions shall be avoided by assuring proper design and placement of exhaust vents and related equipment. For example, a ventilation system which contains a number of vents placed at appropriate locations can be designed to avoid exhaustive air emissions problems.

iii. Stationary Sources: QMT Ventilation Building

As described above, significant impacts at certain elevated locations at 708 First Avenue due to PM<sub>2.5</sub> emissions from the QMT ventilation building could occur. ERRC shall prepare and file with the appropriate City agencies, as part of the above air quality studies, an analysis to determine the potential for a significant impact from these emissions under the applicable criteria. This analysis may include the evaluation of building properties and site plans, the location of operable windows and fresh air intakes, monitoring of actual concentrations on the property, and physical modeling. It should be based on the specific project design, as well as updated background and incremental PM<sub>2.5</sub> emissions data from the QMT ventilation building. In addition, changes in the sulfur content of diesel fuel mandated in 2006 should be taken into account, and updated emission factors may be employed if they are available. If the analysis identifies significant impacts, potential mitigation may include one or more of the following measures: (a) sealing windows at the heights where significant adverse impacts would occur; and (b) locating air intake openings either on the south side of the building at impacted heights or at either much lower or higher elevations on the structure.

9. Noise

To mitigate the significant noise impacts identified in the FGEIS, ERRC shall implement design goals in accordance with NYC Noise Quality and attenuation criteria that achieve appropriate indoor noise levels. Options for doing so include, but are not limited to, incorporating noise reducing window features (e.g., closing air gaps, using thicker glazing) and additional building insulation into the design of buildings facing the FDR Drive Service Road and East 35th Street.

10. Construction

To minimize the potential for cumulative impacts resulting from the possible simultaneous construction of several projects in the East Midtown area, ERRC should seek to participate in the Interagency Traffic Task Force initiated by MTA/NYCT to develop, implement, and monitor a comprehensive traffic mitigation plan.

11. Historic Resources

In comments dated June 18, 2001, the Historic Preservation Field Services Bureau of the New York State Office of Parks Recreation and Historic Resources (OPRHP) provided an opinion that Waterside does not meet the criteria for listing on the State and National Registers of Historic Places. OPRHP also determined that there are no further historic preservation issues that warranted the Commission's review, pursuant to the New York State Parks, Recreation and Historic Preservation Law §14.09.

Waterside lacks the uniqueness, integrity and importance required to render it worthy of preservation as an historic or architectural resource. Accordingly, as noted below, its demolition would not constitute a significant impact on historical, architectural or archeological resources. Nevertheless, we find that, consistent with the recommendations of the OPRHP, some of the Waterside buildings contain important historical and architectural elements. Therefore, ERRC shall consider incorporating some portion of those elements into the design of its development. Additionally, Con Edison or ERRC shall photo-document the Waterside buildings and their historic elements pursuant to Historic American Engineering Record standards and keep such photos in a location available for public viewing. Further, in consultation with OPRHP, ERRC shall prepare and implement, prior to construction, a construction protection plan that avoids potential physical impacts to historic resources including Windsor Tower of Tudor City and the Kips Bay Brewery.

C. Mitigation – As-of-Right Scenario

We recognize that ERRC could proceed with development of the Properties under existing zoning without the need for further discretionary approvals or environmental review. Therefore, should ERRC decide to proceed under the As-of-Right Scenario, we direct it to implement the following mitigation measures. Specifically, ERRC shall implement the mitigation measures within its control and seek implementation of those measures under the control of other agencies, to the extent required, to mitigate all significant open space, urban design, neighborhood character, traffic, transit and pedestrian, air quality, and noise impacts identified in the FGEIS arising from this development program.

1. Open Space

ERRC shall provide publicly accessible passive open space either on the Properties or elsewhere in the study area in an amount sufficient to offset the demand generated by the new worker population on-site as calculated in accordance with the CEQR Technical Manual methodology. The design criteria ERRC shall use will include measures to maximize open space benefits, and minimize adverse influences taking consideration of: (1) the type, quantity, and location of seating; (2) the amount and duration of exposure to sustained sun, wind, and shadows; (3) proximity to noise generators (e.g., roadways or industrial plants); (4) the type, quantity and quality of shade trees, greenery and ornamental plantings; (5) overall maintenance, appearance, and accessibility; and (6) the public's perception of the safety of the open space resources.

2. Urban Design

ERRC shall design its development of the Properties in a manner that is sensitive to the urban design context of the neighborhood, and that minimizes or avoids design features that significantly conflict with the character of the area. In addition, the final project design shall include streetscape elements and building arrangements that are compatible with the urban design context of the neighborhood and maximize views of visual resources to the extent practicable.

3. Traffic

ERRC shall apply to NYCDOT and other relevant agencies to implement all necessary traffic mitigation measures identified above and as described in the FGEIS for the As-of-Right Scenario.

4. Transit and Pedestrians

ERRC shall request that the MTA or NYCDOT undertake the following measures, as more fully described in the FGEIS: (1) widen the PL9 staircase leading from the R241A control area at Grand Central Terminal to the Flushing Line; (2) increase the number of standard buses serving the study area on the M42 bus route, or replace a portion of the existing standard buses with articulated vehicles on such route; (3) widen the crosswalks at 42nd Street and Third Avenue and at 40th Street and First Avenue.

5. Air Quality

ERRC shall locate air intakes so as to avoid any significant air impacts resulting from PM<sub>10</sub>, NO<sub>2</sub>, or SO<sub>2</sub> emissions from the garage vents and HVAC systems. ERRC shall analyze PM<sub>2.5</sub> emissions from the HVAC systems in the context of its specific project design. In the event that the predicted emissions result in significant impacts based on the applicable criteria, the design of the development shall be modified to appropriately mitigate the impacts identified. Acceptable mitigation measures include: (1) relocation of stacks; (2) relocation of air intakes; (3) to the extent technically feasible, location of vents at the top of the tallest buildings in the development; and (4) use of natural gas or steam for heating and cooling.

D. Reduction of Density as Mitigation

Some parties have requested that we limit the magnitude of ERRC's development of the Properties. While SEQRA grants us the authority to do so, we do not find any reasonable basis for granting the parties' request. The impacts of the 6 FAR Alternatives, as compared to those of the other Development Programs, are not so materially different as to require us to limit the density of the development of the Properties as part of our approval of the proposed sale. As set forth in the FGEIS and described herein, very few unmitigatable impacts have been identified as resulting from the 12 FAR Rezoning Scenario; those that have been identified are solely in the area of traffic and would be similarly unmitigatable under the 6 FAR Alternatives. With respect to the rest of the impacts identified in the FGEIS, suitable mitigation, or ranges of mitigation measures, has been proposed. When ERRC prepares and submits its specific development plan to NYCDCP and other City agencies, the future Lead Agency will select from among these, or other, mitigation measures and require implementation of the appropriate measures to ameliorate or minimize the potential impacts identified relative to that plan.

Alternatives

The FGEIS presented a generic review and analysis of the following alternatives: (1) a No-Action Alternative; (2) a 6 FAR Residential Alternative, a 6 FAR Mixed-Use Alternative, and a 6 FAR As-of-Right Alternative (collectively, the 6 FAR Alternatives); (3) a Limited Disposition Alternative (in which the Waterside property would not be sold); (4) an Adaptive Waterside Reuse Alternative (in which the Waterside buildings would not be demolished);<sup>16</sup> and (5) an alternative development plan submitted by EMCSD. We make the following findings related to the material differences and similarities between the various alternatives and the Rezoning Scenario, the positive and negative impacts of such alternatives as compared to the impacts of the Rezoning Scenario, the benefits and impacts of the No-Action Alternative, and whether such alternatives should be implemented.

A. No-Action Alternative

The No-Action Alternative assumes that the Proposed Action would not be approved and that the Properties would not be sold or developed by Con Edison. It also assumes (as do the Development Scenarios) that the facilities and structure on the Properties are decommissioned and demolished, and that the sites are remediated of contaminants pursuant to NYSDEC approved work plans.<sup>17</sup> The underlying zoning of the Properties would not change, and no other discretionary actions regarding the Properties would be approved.

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<sup>16</sup> In comparing the alternatives, we have not limited our consideration to the direct effects of the approval of the contract of sale. In accordance with the requirements of SEQRA, we have also taken into account the long term and indirect impacts that may result from the development of the Properties subsequent to the sale. The alternatives were developed to, and compared at, the same level of detail as the hypothetical Development Scenarios.

<sup>17</sup> Because the impacts of the decommissioning, demolition, and remediation activities would be the same under all alternatives, except the Adaptive Waterside Reuse Alternative, they need not be separately identified and discussed.



1. Analysis

Neither the Proposed Action nor the No-Action Alternative would result in significant impacts in the areas of land use, zoning and public policy; socioeconomic conditions; historic and archeological resources; hazardous materials; coastal resources; or infrastructure, solid waste and energy. Impacts of the No-Action Alternative would differ materially from those of the Proposed Action with respect to certain subject areas, while they would be similar with respect to other subject areas. Those material differences and similarities, as well as the relevant benefits and detriments of the No-Action Alternative, have been considered in the FGEIS and are summarized below.

i. Land Use, Zoning, and Public Policy

Under the No-Action Alternative, the existing utility use would be replaced by vacant land rather than redeveloped with uses compatible with surrounding residential and commercial uses. The No-Action Alternative would contrast with the predominant land use trend toward moderate- and large-scale residential and office uses in the project vicinity.

ii. Socioeconomic Conditions

The No-Action Alternative would not result in the creation of 651 to 11,716 permanent jobs on the sites, as well as 2,726 to 13,336 person-years of construction employment. Moreover, the No-Action Alternative would provide no benefit to Con Edison's ratepayers because the sales proceeds specified in the Agreement would not be realized. City and state tax revenues would also be lower under the No-Action Alternative than under any of the Development Scenarios. For example, estimated real estate tax revenues of \$8.34 million under the As-of-Right Scenario, \$28.73 million under the Residential Development Program, and \$38.64 million under the Mixed-Use Development Program would not be realized.

iii. Community Facilities

No significant community facility impacts would result under the No-Action Alternative. The increased demand for certain community facilities due to development subsequent to the Proposed Action would not occur. There would be no potential impacts due to increased demands on elementary schools or public day care

facilities. Neither the No-Action Alternative nor the Proposed Action would result in adverse impacts on fire or police protection services, libraries, or outpatient health care facilities.

iv. Open Space

The potential for significant open space impacts would not occur with the No-Action Alternative. However, under the No-Action alternative, there would be no creation of publicly accessible open space on the Properties. Thus, the passive open space ratios for the study area would decline over existing conditions, especially with the loss of the Robert Moses Playground if the UNDC office building is constructed. Overall, the improvements in passive open space ratios under the Rezoning Scenario represent benefits when compared to the No-Action Alternative.

v. Shadows

No significant shadow impacts would occur under the No-Action Alternative, and the predicted shadows cast by the proposed buildings in the Development Scenarios would be avoided.

vi. Urban Design and Visual Resources

Neither the No-Action Alternative nor the Development Scenarios would result in important public view or view corridor interruptions, nor would they result in significant impacts to urban design and visual resources. Under the No-Action Alternative, the urban design of the Waterside property would change substantially. The demolition of the existing buildings would eliminate the unbroken streetwall that extends up the east side of First Avenue from East 38th Street to East 40th Street. With the buildings removed, the vacant Properties would provide a visual contrast with the surrounding mid- to high-rise residential neighborhoods. This perceived contrast would increase in the event the UNDC building is constructed, as the UNDC building would further reinforce the street wall continuity.

vii. Neighborhood Character

No significant impacts on neighborhood character would result from the No-Action Alternative.

The neighborhood is comprised primarily of moderate- to high-density residential and commercial buildings. Under the No-Action Alternative, the Properties would remain vacant, which would contrast with the neighborhood. The dissimilarity would be more pronounced if the UNDC buildings were built. In comparison, the Development Scenarios are consistent with the character of the surrounding area and would replace utility uses that contrast with the adjacent neighborhood.

viii. Infrastructure, Solid Waste and Energy

No significant impacts to infrastructure, solid waste, or energy resources are expected under the No-Action Alternative or under the Development Scenarios.

ix. Traffic and Parking

No significant changes to traffic and parking availability would result under the No-Action Alternative; thus, conditions under the No-Action Alternative would be better than those identified under the Development Scenarios. None of the traffic mitigation measures identified for the Proposed Action would need to be implemented for the No-Action Alternative.

x. Transit and Pedestrians

Under the No-Action Alternative, there would be no new development at the Properties. Therefore, transit and pedestrian activity would not be affected.

xi. Air Quality

The No-Action Alternative would not result in any de minimis mobile source CO impacts at receptor locations. With the proposed traffic mitigation measures, the Development Scenarios would not result in significant mobile source impacts. The No-Action Alternative would not result in significant air quality impacts from stationary sources because no such sources would be located on the Properties. Such impacts could arise, however, from building HVAC systems associated with the Development Scenarios.

xii. Noise

Because the Properties would not be used under the No-Action Alternative, noise levels would be lower than predicted for the Development Scenarios. However,

under both the Development Scenarios and the No-Action Alternative, noise would not be a significant impact.

xiii. Construction Impacts

Under the No-Action Alternative, there would be no construction, or construction impacts, on the Properties. In contrast, there could be short-term impacts to traffic, parking, noise, and air quality during construction associated with the Development Scenarios.

2. Determination

Although the No-Action Alternative would result in fewer impacts than the Development Scenarios, it is not a reasonable alternative to the Proposed Action. The No-Action Alternative is not consistent with Con Edison's Steam Plan or our Phase II Order. It would not promote economic development in New York City, increase opportunities for new housing and commercial office space in Midtown Manhattan, or bring under-utilized real property to a higher and better use. It would, however, eliminate the predicted tax benefits to the City and State that would accrue with the Proposed Action. Further, under the No-Action Alternative, the use of the Properties would contrast with the surrounding neighborhood of moderate- to large-scale residential and commercial buildings, and with the area trend for similar development (e.g., the proposed UNDC office building on an adjacent site). Finally, that Alternative is inconsistent with the public's request for more accessible open space and public amenities in the area.

B. The 6 FAR Alternatives

The 6 FAR Alternatives assume development programs in which the Properties are rezoned to a lesser density than contemplated in the Rezoning Scenario.<sup>18</sup> As with the Rezoning Scenario, the 6 FAR Alternatives would require zoning, height, and setback modifications for the Properties, except that 685 First Avenue is assumed to retain its existing C1-9 zoning. Also, the development program for that site reflects development rights from the parking lot portion of the site only.

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<sup>18</sup> The Rezoning Scenario assume a 12 FAR level of development.

1. Analysis

The reduction in overall building bulk under the 6 FAR Alternatives would alter the resultant population and design of the buildings when compared to the Rezoning Scenario. In many respects the predicted impacts would generally be similar. For example, none of the development alternatives would result in significant adverse impacts in the areas of land use, zoning and public policy; socioeconomic conditions; historic and archeological resources; hazardous materials; coastal resources; or infrastructure, solid waste and energy. The differences in the impacts of the 6 FAR Alternatives with the Development Scenarios for the remaining areas are summarized below.

i. Land Use, Zoning, and Public Policy

The As-of-Right Scenario would add more than a million gross square feet (gsf) of development, virtually all of it commercial. These uses, particularly destination commercial retail and entertainment uses, would be new to the area and would differ from the trend toward high density residential neighborhoods with a mixed-use area near the United Nations (UN). The Rezoning Scenario and its illustrative development programs would be consistent with trends in the study area in that they would replace the heavy manufacturing zoning on the Properties, with zoning designations and development that would be more compatible with existing land uses and City policy for the area. The Residential Development Program, designed to comport with the zoning density underlying most recent nearby development, would be consistent with land use, zoning, and public policy in the study area. The Mixed-Use Development Program would be less consistent with land uses, zoning and public policy in the study area than the Residential Program alternatives. Substantial office development in the area two to four blocks south of East 42nd Street appears to contrast with public policy trends promoting residential, rather than office uses, in the area south of the Properties. On balance, that contrast would not be a significant impact.

The Mixed-Use on 708 First Avenue Development Program would place commercial office development on the most northerly site, closest to the high density mixed-use district near the UN, and would be consistent with land use, zoning, and public

policy in the study area. The 6 FAR Alternatives would also involve a change in land use, altering the Properties to provide a new large-scale residential community. Reducing the density through rezoning to a 6 FAR district would create a zoning district substantially less dense than existing zoning densities in the area. Commercial districts in the area permit development of at least 10 FAR while C1-9 residential districts in the area permits residential development of up to 10 FAR, and up to 12 FAR with bonus. The proposed UNDC building would likely also be built at a high FAR.

ii. Socioeconomic Conditions

Compared to the Rezoning Scenario, the 6 FAR Alternatives would reduce the sale proceeds from the Proposed Action by approximately \$300 million. This reduction would similarly reduce the benefit Con Edison's ratepayers would receive and prevent the use of those proceeds to ameliorate rate increases or offset utility expenses that otherwise would be recovered from customers. The economic benefits from construction and operation of development under these alternatives would be less than that under the Rezoning Scenario's Development Programs. For example, property tax revenues from the 6 FAR Residential Alternative would be approximately \$13.85 million less than those from the Residential Development Program; property tax revenues under the 6 FAR Mixed-Use Alternative would be approximately \$18.02 million less than those from the Mixed-Use Development Program. Other tax revenues, employment, and overall economic output also would be less under the 6 FAR Alternatives when compared to the Rezoning Scenario.

iii. Community Facilities

Community facilities in the area could generally support the level of development anticipated from the Development Scenarios or the 6 FAR Alternatives. That is, for police, fire, public day care, hospitals, and libraries, none of the alternatives would result in significant impacts. Both the 6 FAR Alternatives and the Rezoning Scenario would cause significant impacts on elementary schools in 2007 and 2011, although the 6 FAR Alternatives would have less of an impact. Development under the "80/20" program in the 6 FAR Residential Alternative, or the "80/20" Residential

Development Program, would have potential for a significant impact to public day care facilities.

iv. Open Space

The Development Scenarios and the 6 FAR Alternatives would result in open space impacts by introducing new populations to the community (estimated to be 3,597 new workers under the As-of-Right Scenario; 4,808 new residents under the 6 FAR Residential Alternative; 2,454 new residents and 6,092 workers under the 6 FAR Mixed-Use Alternative; 9,310 new residents under the Residential Development Program; and 4,463 new residents and 11,716 workers under the Mixed-Use Development Program). However, neither the As-of-Right Scenario nor the 6 FAR Alternatives would be expected to offer the 3.3 acres of public open space on the Properties that is associated with the Rezoning Scenario, since such open space would be provided in conjunction with the bonus allowed under the 12 FAR Development Programs. By 2011, there would be an approximately 5.1% decrease in the combined worker/resident passive open space ratio in the ¼-mile study area under the 6 FAR Residential Alternative, compared to an approximately 3.1% increase in the ratio under the Residential Development Program. In the ½-mile study area, the 6 FAR Residential Alternative would result in an approximately 6.0% reduction in the total open space ratio for residents, compared to a 2.1% reduction under the Residential Development Program. Similarly, the 6 FAR Mixed-Use Alternative would cause the open space ratios in the study areas to deteriorate, while the open space ratios would improve with the Mixed-Use Development Programs. In sum, without mitigation, the 6 FAR Alternatives would result in greater decreases in the open space ratios in the study area, and would not result in any of the increases in ratios associated with the Rezoning Scenario. With the open space reduction at Robert Moses Playground due to the UNDC development, and a portion of St. Vartan Park occupied during the Second Avenue Subway construction, open space improvements available under the Development Scenarios are even more important to maintaining open space in the study area.

v. Shadows

Buildings in the As-of-Right Scenario would be no taller than 256 feet, casting shadows on adjacent open spaces, including St. Vartan Park and Manhattan Place adjacent to 616 First Avenue and Robert Moses Playground adjacent to 708 First Avenue. Each of the 6 FAR Alternatives, and the Rezoning Scenario, would involve the construction of tall buildings which would generate long shadows that would reach the Tudor City open spaces during the December analysis period and create significant adverse impacts. Overall, the extent of shadows from the 6 FAR Alternatives with shorter buildings would be less than the buildings under the Rezoning Scenario, although for open spaces close to the Properties, the effects would be similar under all development alternatives.

vi. Urban Design and Visual Resources

No significant impacts are expected under the As-of-Right Scenario, the 6 FAR Alternatives or the Rezoning Scenario. However such impacts cannot be ruled out in the absence of ERRC's specific development plan. While building heights would generally be shorter under the As-of-Right Scenario and 6 FAR Alternatives, major new buildings would be constructed, creating a large-scale complex that would dramatically alter views toward the site. Compared to the Rezoning Scenario, the lesser amount of public open space on the Properties under the As-of-Right Scenario or 6 FAR Alternatives would diminish the openness and attractiveness of these alternatives.

vii. Neighborhood Character

Significant impacts on neighborhood character are not expected under the As-of-Right Scenario, the 6 FAR Alternatives, or the Rezoning Scenario, although such impacts cannot be ruled out in the absence of ERRC's specific development plan. In most respects, the impacts of the As-of-Right Scenario and the 6 FAR Alternatives would be similar to those expected with the Rezoning Scenario. However, because of their reduced densities, the impact on urban design would be different; the concentration of activity and the massing of the buildings would be less pronounced. The scale of the new development would tend to be at a lesser intensity than that which characterizes most new development on the avenues in the study area. Also, the As-of-Right Scenario and the



6 FAR Alternatives would be less in character with most new residential or commercial development in the study area, especially accounting for the proposed UNDC project.

viii. Traffic and Parking

The traffic generated by the As-of-Right Scenario and the 6 FAR Alternatives would be substantially less than that generated under the Rezoning Scenario. However, significant traffic impacts are predicted for each development alternative, especially when the UNDC office building and Second Avenue Subway construction are factored in as background conditions. The 6 FAR Alternatives would create fewer impacts in locations to the north in the Expanded Study Area, as compared to the Rezoning Scenario, but would still create unmitigatable impacts at the foot of the Queensboro Bridge due to the limited ability of the street network to accommodate new traffic at that major entry point into Manhattan.

ix. Transit and Pedestrians

The As-of-Right Scenario would result in increased usage of the area's subway stations. While there should be sufficient capacity to accommodate these future trips such that control areas and stairways would operate at LOS C or better, there would be significant impacts at the Grand Central Terminal PL9 platform stairway leading from the R241A control area to the Flushing Line (7 Train) platform in both the AM and PM peak hours and at the P12 platform stairway in the PM peak hour. The 6 FAR Alternatives would generate approximately 50% fewer transit trips than the Rezoning Scenario, but development of either the 6 FAR Alternatives or the Rezoning Scenario would cause an impact on the PL9 stairway at Grand Central Terminal. While the degree of impact at this location would be less for the 6 FAR Alternatives than for the Rezoning Scenario, it would nevertheless be significant. The As-of-Right Scenario and 6 FAR Alternatives would also cause a minor impact on the M42 bus route. Finally, although the As-of-Right Scenario and the 6 FAR Alternatives would result in fewer pedestrian impacts than under the Rezoning Scenario, similar types of mitigation for all development alternatives would be warranted at certain locations.

x. Air Quality

Development of either the Rezoning Scenario or the 6 FAR Alternatives would result in no violations of the NAAQS for carbon monoxide (CO). With the proposed traffic mitigation measures, neither the Rezoning Scenario nor the 6 FAR Alternatives would result in significant mobile source impacts. Because there are no specific plans for garage locations or mechanical system specifications, potential impacts from garage emissions under all development alternatives cannot be ruled out. Similarly, because there are no specific plans for the HVAC systems, there may be impacts related to stationary emission sources under all development alternatives. Regardless of the development alternative, the potential air quality impacts would be mitigated via the measures discussed above.

xi. Noise

Interior noise impacts are predicted for lower floor levels within new buildings under all of the development alternatives and must be mitigated; no matter which alternative is selected, the mitigation measures would be same. For all development alternatives, there will be no significant changes to outdoor ambient noise levels. Regardless of the density of development, building mechanical equipment must be equipped with sufficient noise reduction devices to comply with applicable noise regulations and standards.

xii. Construction

Construction of the As-of-Right Scenario or 6 FAR Alternatives would result in a shorter construction period than for the Rezoning Scenario. However, under all development alternatives, development of the Waterside property would not be complete until 2011. Cumulative impacts relating to the simultaneous construction of several projects in the East Midtown area would also persist regardless of the density of development on the Properties.

2. Determination

The 6 FAR Alternatives would not, on balance, significantly reduce predicted impacts below levels for Rezoning Scenario. They are not consistent with our goal of maximizing the value of the Properties for Con Edison's ratepayers or with

Petitioners' development objectives. With the exception of unmitigatable impacts to traffic and potential temporary unmitigatable impacts to pedestrian conditions, which persist even under the 6 FAR Alternatives, all significant impacts related to the Development Scenarios can be minimized or avoided, so a reduction in density is unnecessary. Also, as discussed above and in the FGEIS, the 6 FAR Alternatives do not reflect a zoning district characteristic of the area and would not provide the 3.3 acres of public open space, tax revenues, or economic development benefits that would be provided by the Rezoning Scenario. Therefore, limiting the total density of development on the Properties, as some parties have requested, is not appropriate.

However, we note that when ERRC prepares and submits its specific development plan to the appropriate City agencies, the future Lead Agency will be required to review the potential environmental impacts related to the detailed plan and balance them with the plan's social and economic factors. If, as a result of that Lead Agency's review and balancing, it finds that a reduction in FAR from 12 is appropriate, it has the ability to reduce the scale of the development.

C. Limited Disposition Alternative

The Limited Disposition Alternative consists of the sale and development of the 616, 685, and 708 First Avenue properties and the retention of the Waterside property by Con Edison.<sup>19</sup> In this Alternative, as in the Rezoning Scenario, residential or a combination of residential and commercial uses would be developed on the divested properties. To evaluate the range of impacts arising under this Alternative, three development programs were analyzed—as-of-right, residential, and mixed-use. The composition of these programs is similar to that described for those properties in the Development Scenarios. Because completion of the development would not depend on the availability of the Waterside property, full build-out could occur by 2007.

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<sup>19</sup> Con Edison would nevertheless decommission and demolish Waterside once ERRP becomes operational, and remediate the site. As in the No-Action Alternative, the analysis assumes that the site would then remain undeveloped.

1. Analysis

The Limited Disposition Alternative, like the Rezoning Scenario, would not result in significant impacts in the areas of land use, zoning and public policy; socioeconomic conditions; historic and archaeological resources; hazardous materials; coastal resources; or infrastructure, solid waste and energy. In the remaining areas studied in the FGEIS, the Limited Disposition Alternative would have impacts that are either similar to, or differ materially from, those of the Rezoning Scenario. The similarities and differences, as well as the relevant benefits and detriments of the Limited Disposition Alternative, are summarized below.

i. Land Use, Zoning, and Public Policy

All of the development programs under this Alternative would be consistent with public policy in the study area in that they would replace the heavy manufacturing zoning currently mapped on the Properties with zoning and development that would be more compatible with current City policy for the area. Leaving the Waterside property vacant, however, would be inconsistent with land use, zoning, and public policy trends in the study area.

ii. Socioeconomic Conditions

The Limited Disposition Alternative would result in a reduction in the sales proceeds of about \$290 million. It would also generate less tax revenues for the City and State (e.g., the FGEIS estimates that lost annual property tax revenues related to the Waterside property would range from \$1.1 million to \$25.1 million).

iii. Community Facilities

None of the development programs under this Alternative are expected to have a significant impact on police and fire protection services, libraries, or outpatient health care facilities. However, if the three properties were developed under the "80/20" residential program, there could be a potentially significant impact on public day care facilities. This impact could be avoided through the provision of vouchers for private day care facilities, the construction of new day care facilities, or expansion of existing facilities. Similar significant impacts on elementary schools are predicted for the Limited

Disposition Alternative as for the Development Scenarios. Those impacts could be mitigated by the same measures described for those scenarios.

iv. Open Space

The development programs under the Limited Disposition Alternative would result in the same quantitative impacts predicted for the Development Scenarios in 2007. In addition, similar to the Rezoning Scenario in 2007, the development programs under this Alternative would reduce some open space ratios that are already below NYCDCP guidelines. Thus, they could have significant impacts on open space resources in the ¼-and ½-mile study areas. Mitigation for such impacts would be similar to measures described for the Development Scenarios. However, under this alternative, the impact under the mixed-use program with office on 708 First Avenue could not be mitigated by the provision of additional open space on the Waterside property, as that site would not be available for development. Thus, this Alternative, under any development program, would provide less on-site open space than under the Rezoning Scenario. Further, because of the generic nature of the environmental review, there are no specific plans for the open space design and program. Consequently, significant impacts related to the qualitative impacts of the open space cannot be ruled out.

v. Shadows

Impacts under the Limited Disposition Alternative's residential and mixed-use development programs would occur at the Tudor City open spaces during the December 21 analysis period. These impacts are similar to those discussed for the Residential and Mixed-Use Development Programs under the Rezoning Scenario.

vi. Urban Design and Visual Resources

Tall buildings would be constructed under the Limited Disposition Alternative, resulting in a prominent new presence in the area. The tower and plaza configurations contemplated for these buildings would be somewhat similar to the existing urban design of the modern buildings in the study area, especially on First Avenue, and the smaller on-site open spaces would constitute new visual resources in the area. View corridors would be provided along the prolongations of East 39th and 40th Streets. While removing the Waterside property would reduce the number of buildings

under all development programs, it would limit Petitioners' goals and objectives, including their goal of creating an integrated development with large public open spaces.

Neither the Limited Disposition Alternative nor the Development Scenarios would block any important public views or view corridors. However, given the generic nature of this environmental review, and the concomitant absence of specific development plans for the Properties, significant impacts related to urban design cannot be ruled out with respect to this Alternative, or the Development Scenarios. Should the urban design characteristics of ERRC's specific development plan conflict, or be inconsistent, with the urban design characteristics of the area, or adversely impact or otherwise substantially alter views to visual resources and/or view corridors, it is possible that this Alternative could result in significant impacts to urban design and/or visual resources.

vii. Neighborhood Character

All of the development programs under the Limited Disposition Alternative would develop the three properties as individual blocks typical of other recent development in the area, as compared to the integrated development that would be possible under the Development Scenarios. Nonetheless, this Alternative would reflect a change in the three properties from utility use to residential and commercial uses consistent with the evolving character of the neighborhood, including changes to the bulk, size, and scale of the buildings on the properties. Leaving the Waterside property vacant would limit the opportunity to create a coherent addition to the neighborhood, and the vacant site would be inconsistent with the character of the neighborhood. From an impact perspective, this Alternative presents a similar situation as the Development Scenarios. That is, because ERRC's specific development plan for the three properties may vary from the hypothetical scenarios considered in the FGEIS, impacts from this Alternative on neighborhood character and, in particular, urban design, like those from the Development Scenarios, cannot be ruled out.

viii. Traffic and Parking

Traffic generated under the Limited Disposition Alternative programs would be substantially less than that generated under the full build out of the Rezoning

Scenario in 2011. However, the traffic impacts of the Limited Disposition Alternative programs would be equivalent to those under the Development Scenarios in the year 2007. At that time, all development alternatives would result in significantly increased traffic volumes and would therefore create significant traffic impacts within the area studied. With one exception, the amount of off-street parking to be provided under each of the Limited Disposition Alternative development programs would be sufficient to accommodate the total parking demands of the programs. The exception is the mixed-use development program with office on 708 First Avenue, which would have a parking shortfall of up to approximately 400 spaces during the period just after the morning peak period commute and again during the early afternoon hours. Without additional on-site parking, this traffic would need to be accommodated at other parking facilities in the area.

ix. Transit and Pedestrians

The Limited Disposition Alternative would result in significant impacts to crosswalks and corner reservoirs at certain intersections, but not to midblock sidewalks. The Alternative's rezoning programs would result in the same impacts on bus service in 2007 as those of the Rezoning Scenario. With respect to subways, significant impacts would occur at a maximum of two platform stairways under the Alternative's mixed-use development programs, and at one platform stairway under the Alternative's as-of-right and residential development programs. The first set of impacts could be mitigated by measures such as widening crosswalks, removing corner obstructions, and signal timing adjustments. The impacts to bus service could be mitigated with increased service and/or the replacement of existing buses with articulated vehicles. The subway impacts, which are the same for those locations as those discussed under the Development Scenarios, could be mitigated via the same measures set forth for the Development Scenarios' impacts.

x. Air Quality

Assuming that the traffic mitigation identified in the FGEIS is implemented, none of the Limited Disposition Alternative's development programs would result in significant air quality impacts due to mobile sources. The Development

Scenarios and the Limited Disposition Alternative would not cause violations of the NAAQS for CO, and would be consistent with the SIP. For this Alternative, even with substantially reduced vehicular trip generation, de minimis increments may still occur. Because there are no specific plans for the garage locations or specifications for their mechanical systems for this (or any other) development alternative, impacts from garage emissions cannot be ruled out. Similarly, since there are no specific plans for the HVAC systems for this (or any other) development alternative, potential impacts related to stationary sources must be acknowledged. Also, under the Limited Disposition Alternative, as with the Development Scenarios, there are potentially significant impacts from the QMT ventilation structure. To the extent that impacts are identified, they can be mitigated by relocating and/or redesigning mechanical systems and/or exhaust placements.

xi. Noise

As with the Development Scenarios, changes in ambient noise levels would be insignificant for the Limited Disposition Alternative, and sufficient noise reduction devices will be required for building mechanical equipment under any development alternative to comply with applicable noise regulations and standards. Like the Development Scenarios, this Alternative would have potential impacts related to exceedances of interior noise levels within portions of the new buildings. The same mitigation measures discussed for the Development Scenarios could be applied to this Alternative's buildings to mitigate such potential impacts.

xii. Coastal Zone Management

Development anticipated with the Limited Disposition Alternative would be consistent with applicable local and statewide coastal zone management policies, including the City's Waterfront Revitalization Program. However, the exclusion of the Waterside property in this Alternative would limit the opportunity for public access to the waterfront.

xiii. Construction Impacts

Construction activities would be similar to those with the Development Scenarios. However, because of the exclusion of development on the Waterside



property, the period of construction would be shorter, ending by 2007 rather than 2011. Cumulative impacts resulting from simultaneous construction of several projects in the East Midtown area would persist regardless of whether the Limited Disposition Alternative is implemented.

2. Determination

Under the Limited Disposition Alternative, the exclusion of the Waterside property would limit the land available for use as public open spaces, and the open space ratio for the local area would be reduced; it would also reduce the opportunity for reconnection of the neighborhood with the waterfront. Further, our objective of maximizing the value of the Properties, with their concomitant benefits to Con Edison's ratepayers, as stated in the Phase II Order and Opinion Nos. 97-15 and 00-15, would not be fully achieved. Similarly, this Alternative would not satisfy Petitioners' goals and objectives, as stated in the FGEIS, including their goal of creating an integrated development in that area. Based on these factors, we find that the benefit of the limited reduction in the number and degree of identified potentially significant impacts related to the Limited Disposition Alternative is outweighed by the benefits that would be achieved by the sale and development of the Properties.

D. Adaptive Waterside Reuse Alternative

The Adaptive Waterside Reuse Alternative examines the potential for retaining and reusing the power plant structures located on the Waterside property. Options considered include using the structures for residential, commercial, retail, and community (e.g., museum) purposes.

1. Analysis

The Adaptive Waterside Reuse Alternative would not result in significant impacts in the areas of land use, zoning and public policy; socioeconomics; historic and archaeological resources; hazardous materials; coastal resources; infrastructure; solid waste and energy. However, the impacts of the Adaptive Waterside Reuse Alternative would differ materially from, or be similar to, those of the Development Scenarios in certain areas. The material differences and similarities, as well as the relevant benefits and detriments of the Adaptive Reuse Alternative, are summarized below.

i. Socioeconomic Conditions

As discussed in the FGEIS, the costs of site preparation and remediation for this Alternative would far exceed those of the other development alternatives.

ii. Community Facilities

The Adaptive Waterside Reuse Alternative would have a significant impact on area public elementary schools in 2007, and on area and District-wide public elementary schools in 2011. However, since there would be fewer total residential units under this Alternative, the extent of the impact would be less than the impact under the Rezoning Scenario. If this Alternative were to be developed under the "80/20" Program, there would be the potential for significant impacts on public day care facilities similar to those with the "80/20" Residential Development Program under the Rezoning Scenario. Again, given that there are fewer total residential units under this Alternative, the extent of the potential impact on public day care facilities would be less than that under the Rezoning Scenario.

This Alternative, like the Development Scenarios, would have no other impacts on community facilities. However, it must be recognized that the use of the Waterside buildings as a museum would introduce a large community facility into the immediate neighborhood.

iii. Open Space and Recreational Facilities

The Adaptive Waterside Reuse Alternative would result in greater impacts than the Rezoning Scenario because retaining the existing structures would preclude the development of significant open space on the Waterside property. Open spaces would be limited to two east-west view corridors and a narrow north-south strip along the eastern edge overlooking the East River. Only the eastern end of those corridors and the north-south strip along the eastern edge of the property, totaling approximately 1.13 acres in the Alternative's residential program, and approximately 0.90 acre in its mixed-use program, would be available to serve as usable public open space. This limitation in available space would reduce the amount and quality of open space benefits to the public, and by 2011, the impacts would be greater than those under the Rezoning Scenario.

The construction of the UNDC building and the Second Avenue Subway (both of which are background conditions) further worsen the open space ratios for the

development. Mitigation of the potential impacts would be similar to the measures described for the Rezoning Scenario, although additional open space would be needed to offset the decreases in the open space ratios. Moreover, the impact resulting from the Alternative's mixed-use program with office on 708 First Avenue could not be mitigated by the provision of additional open space on the Waterside property, as it would not provide an adequate amount of open space to mitigate the impact. Consequently, significant open space impacts are associated with this Alternative.

iv. Shadows

Shadows associated with this Alternative would be similar to those of the Rezoning Scenario and could result in potentially significant impacts. The buildings on 616 and 685 First Avenue would be the same as those shown in the Rezoning Scenario and would therefore cast the same shadows. There would be no new tower in the center of the Waterside property, and shadows from the Waterside buildings would not impact publicly accessible open space except on that property. If a portion of the office or residential development were shifted into the Waterside buildings, there could be a reduction in shadows cast by new buildings.

v. Historical and Archeological Resources

The reuse of the Waterside buildings, whether as apartments, offices, or a museum, would not have a significant impact on archaeological or historic resources because the buildings are not considered historically important and are not eligible for listing on the State or National Register of Historic Places. Other potential impacts of the Adaptive Waterside Reuse Alternative on historic resources are the same as those under the Developments Scenarios. While the Adaptive Waterside Reuse Alternative contemplates a museum or similar cultural institution as a possible reuse for the Waterside buildings, public comments indicated the desire of some citizens that the FGEIS consider other strategies, such as retaining part or all of these structures as historic resources. In considering these comments, the FGEIS noted that the Waterside buildings have been so materially altered through time that their architectural detailing has been obscured and removed, and their architectural and historical value diminished.

vi. Urban Design and Visual Resources

Maintaining a portion of the existing facades and features of the Waterside buildings would be of limited benefit due to the loss, over the years, of their overall architectural integrity and details. Moreover, the open space proposed in the Rezoning Scenario would be interrupted by the Waterside buildings. Views to the river would be limited to the corridors extending along East 39th and East 40th Streets. The sense of being near the East River waterfront would be constrained when compared to the Rezoning Scenario.

Retaining the Waterside buildings would maintain the existing vista, when viewed from the East River or the Queens waterfront, across these relatively low structures to the Manhattan skyline. However, there would be no large continuous open spaces to look across, and views around the Waterside buildings would be blocked by the larger structures that would be built to maintain the benefits of the Rezoning Scenario. Thus, the Adaptive Waterside Reuse Alternative is likely to offer less visual benefit than the Rezoning Scenario. However, a complete determination of whether the Adaptive Waterside Reuse Alternative would result in significant impacts on urban design and visual resources cannot be made due to the generic nature of this environmental review and the corresponding absence of a specific development plan for the Properties.

vii. Neighborhood Character

The Adaptive Reuse Alternative (whether the reuse of the Waterside buildings is as apartments, offices, or a museum), would, like the Rezoning Scenario, be a large mixed-use development that would continue the trend for high-density use in this area of Midtown Manhattan. It would differ from the Rezoning Scenario in that the existing Waterside structures would remain. Because ERRC's specific development plan may vary from the alternative scenarios considered in the FGEIS, impacts from this Alternative on neighborhood character, particularly related to urban design, cannot be ruled out.

viii. Hazardous Materials

Preliminary investigations of the Waterside property indicate that hazardous materials are likely to be present in portions of the buildings' foundations,

floors, and subsurface soils. In addition, it is possible that hazardous materials (including lead-based paint and asbestos) are located in portions of the walls above the foundation level, the concrete floors, insulation, and/or machinery. Because residential uses are proposed for the 708 First Avenue and Waterside properties, the soil and building surfaces must meet both NYSDEC and NYCDEP standards for residential use. Adaptive reuse of the property would require a complicated remediation plan because contaminated structural members must also be abated or replaced without damaging the building. Environmental remediation would add approximately 12 to 18 months to the duration of construction activities in each of the development programs considered in this Alternative. The cost of the environmental remediation work would also be substantially greater due to the increased complexity of the required remediation activities. The TRC Contract did not contemplate remediation with the preservation and reuse of the existing buildings. Thus, under this Alternative, the contemplated scope of TRC's work would be substantially different and presumably significantly more expensive to implement. Moreover, without complete removal of the buildings, full delineation and removal of contaminants may not be possible. The safest, most efficient, and most effective remediation would be accomplished with the buildings demolished and subsurface soils removed.

ix. Traffic and Parking/Transit and Pedestrian

Residential or commercial reuse of the Waterside buildings would have essentially the same program and level of activity as the Rezoning Scenario. Therefore, the reuse of these buildings would have essentially the same traffic, parking, and mass transit impacts. The use of the buildings as a museum could have different traffic, parking, and transit impacts because a museum would likely generate more bus, van, and taxi traffic than would a residential or office use. A museum may also require parking or lay-by facilities for buses and vans. In addition, the timing of trips to the museum would differ from that of residential and office trips, with a higher percentage of museum trips occurring in the midday peak hour and fewer trips occurring during the morning peak hour.

x. Air Quality

Because the Waterside buildings would not be demolished, the potential for fugitive dust emissions and associated air quality impacts related to construction activities at that site would be lessened, if not eliminated. The exceedances of de minimis increments for CO would be similar to those projected for the Rezoning Scenario. Because there are no specific plans for the garage locations or specifications for their mechanical systems for this (or any other) development alternative, impacts from garage emissions cannot be ruled out. Similarly, since there are no specific plans for the HVAC systems for this (or any other) development alternative, potential impacts related to stationary sources must be acknowledged. Also, as under the other development alternatives, there are potentially significant impacts from the QMT ventilation structure under the Adaptive Reuse Alternative. To the extent that impacts are identified, they can be mitigated by relocating and/or redesigning mechanical systems and/or exhaust placements.

xi. Construction Impacts

The Adaptive Waterside Reuse Alternative will require extensive in-place remediation to preserve the Waterside buildings. Remediation and subsequent reconstruction would take more than four years to complete, whether the existing buildings are adapted for residential, commercial, or museum use. Thus, impacts such as construction-related noise and traffic would probably continue for a longer period than under any of the other development alternatives. If building remediation requires removal and replacement of foundations or other structural elements, construction will take even longer, and the risk of damage and collapse of portions of the buildings will be increased. The risk of public or worker exposure to any hazardous materials would be minimized or avoided through implementation of a Health and Safety Plan.

2. Determination

The preservation and adaptive reuse of the Waterside buildings would unduly complicate the cost-effective and timely remediation of the property and could delay realization of the benefits of the sale. Also, the preservation of the Waterside buildings would be of limited utility because they lack historic or architectural integrity

and importance. Further, none of the reuse options would result in the avoidance or substantial reduction of any of the significant adverse impacts of the Rezoning Scenario, and this Alternative would result in a new significant impact because the existing footprint of the buildings would occupy or limit the areas which could be dedicated for open space. Finally, Petitioners' goals and objectives of fully reusing the property with a planned development offering open space, contemporary architecture and public amenities, as described in the FGEIS, would not be realized.

Based on the foregoing, we find that the Adaptive Waterside Reuse Alternative is not preferable or equivalent to the Development Scenarios. Because of its additional costs and impacts, it is also not a reasonable alternative. It is therefore rejected.

E. East Midtown Coalition for Sensible Development Concept Plan

1. Analysis

During the public comment period on the DGEIS, EMCSO submitted a study entitled Alternative Concept Plans for the Consolidated Edison First Avenue Properties that is requested be considered as an additional alternative. We accepted the study as part of EMCSO's comments on the DGEIS and analyzed it in the FGEIS.

The study proposes two alternate concept plans (Plans A and B) for development of the Properties. The two plans appear to be essentially the same, except for the manner in which 685 First Avenue would be developed. Plan A relocates Robert Moses Park to 685 First Avenue and designates the current location of Robert Moses Park as a UN office site; Plan B designates 685 First Avenue as a low-rise community facility use (such as a school), with Robert Moses Park remaining in its current location.

Other elements of the alternate concept plans include: (a) limiting the zoning densities of the Properties to between 6 and 8 FAR and the height of buildings at 616, 700, and 708 First Avenue to 400 feet and at 685 First Avenue to 280 feet; (b) extending both 39th and 40th Streets east of First Avenue across the Waterside property and continuing them as pedestrian bridges over the FDR Drive; (c) creating an enclave of residential development around a passive "Gramercy Park" style open space

on the east side of First Avenue; (d) designating ground floor retail on all frontage on First Avenue; and (e) providing additional open space on the Properties. In addition to these elements, the concept plans contain proposals for other properties. The plans recommend that a continuous East River Esplanade from 34th Street to 42nd Street be created, with overlook parks along the FDR Drive, that Petitioners provide ball fields on lands Con Edison owns on 16th Street near its East River Generating Station, and that the open space surrounding the QMT entrance be upgraded.

2. Determination

We have a number of concerns with EMCSD's concept plans. First, the last three proposals mentioned above are not on the Properties at issue in this proceeding and are not related to the Proposed Action. In the case of the esplanade and QMT entrance recommendations, the properties are owned by unrelated third parties and we cannot require Con Edison or ERRC to interfere with the owners' property rights. Plan A suffers a similar infirmity in that we do not have legal authority to move or create a park or designate where the UN, an entity that is not under our jurisdiction, may build its new office building. Further, the recommendation as to the disposition of 685 First Avenue is not an appropriate condition for the sale since it is not necessary for the mitigation of potential impacts arising from the Development Scenarios.<sup>20</sup>

The zoning density in both concept plans is below that of most new development in the surrounding neighborhood, including the proposed UNDC office building, and mitigation of identified impacts related to the Development Scenarios do not warrant limiting the zoning densities. The proposed limitation of the zoning density is also inconsistent with our objectives, described above, and those of Petitioners. It would also unnecessarily reduce the tax and economic development benefits resulting from the Rezoning Scenario. Further, as explained in the discussion of the 6 FAR

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<sup>20</sup> To the extent the concept plans attempt to address concerns related to the UNDC's proposed office building, SEQRA requires the UNDC to mitigate potential impacts related to its project. The UNDC proposed project was included in the FGEIS as a background condition, only, and we have no obligation under SEQRA to mitigate impacts arising from unrelated projects.



Alternatives, the concept plans would not result in substantially fewer significant environmental impacts and would require nearly identical mitigation measures as the Rezoning Scenario. Finally, mapping and re-establishing the eastward prolongation of East 39th and 40th Streets is not necessary to provide view corridors or pedestrian access to the waterfront as part of a specific project plan.

We find that EMCSD's alternate concept plans for the Properties are not superior or equivalent to the Development Scenarios. Many of the measures the plans propose are not needed to mitigate impacts, so the diminution in benefits that would result from their adoption and implementation is not justified. For the foregoing reasons, we will not further consider or adopt the recommendations contained in the concept plans.

#### Irreversible or Irretrievable Commitment of Resources

While there would be no irreversible or irretrievable commitment of resources related to the sale of the Properties, there are several resources, both natural and man-made, that would be expended in the Properties' subsequent development by ERRC. These resources include the underlying land, building materials used in construction, energy in the form of fuel, gas, and electricity consumed during construction and operation of the buildings and other facilities on the Properties, and the human effort required to develop, construct, and operate the buildings and facilities. These resources are considered irretrievably committed because their reuse after development of the Properties for some other purpose may not be possible.

#### Unmitigated Impacts

The FGEIS identified a few unmitigatable or potentially unmitigatable impacts in certain topic areas. Unmitigatable traffic impacts were identified at a small number of intersections near the QMT and Queensboro Bridge. Additionally, we understand that the practice of NYCDOT and NYPD is to monitor and evaluate construction and as-built conditions for new developments and adjust practicable mitigation measures based on their analysis of existing conditions and impacts. In the

event that those agencies, or others with jurisdiction over the matters discussed in the FGEIS and summarized herein, fail to approve or implement the proposed or required mitigation measures, unmitigated significant impacts could result.

A temporary unmitigatable impact to pedestrian access at the intersection of East 42nd Street and First Avenue could arise if background pedestrian volumes are increased by East Side access and capacity is diminished due to the construction of the Second Avenue Subway. The potential for an unmitigatable shadow impact on Tudor City open spaces was also identified. This impact would arise only if the identified shadow impacts cannot be fully mitigated by implementation of professional design, planning and engineering considerations for the buildings on the Properties.

The construction activities at the Properties, in combination with the potential construction of the Second Avenue Subway, the UNDC project, and the FDR Drive reconstruction project could cause various disruptions and impacts, particularly related to traffic and pedestrian circulation, noise, air quality, and neighborhood character. While construction at the Properties is expected to comply with all applicable regulations, temporary cumulative impacts will occur that in all likelihood will not be fully mitigatable. The severity and duration of the unmitigated impacts will depend upon the timing of the various projects and the construction management techniques and mitigation measures employed. These types of unavoidable impacts are characteristic of major infrastructure and development projects in urban areas and are inherent in large-scale construction in built-up areas.

#### Conditions and Criteria for Approval of Future Actions

The FGEIS prepared in this proceeding is generic in nature because ERRC has not proposed a specific development plan for the Properties. The FGEIS examined the environmental impacts related to the Proposed Action and a range of impacts that may result from the Development Scenarios and other development alternatives described therein by formulating and analyzing various hypothetical scenarios. It has proposed or required, as appropriate and to the extent possible, mitigation measures or ranges of

measures that are to be implemented in order to address the potentially significant adverse impacts identified.

Subsequent to the approval of the proposed sale, we expect ERRC to prepare and submit its specific development plan for the Properties to the appropriate City agencies. Those agencies' consideration of the specific plan will likely require further environmental review under SEQRA and New York City Environmental Quality Review. In accordance with 6 NYCRR §617.10(c), we attach the following conditions to our approval of the sale:

1. If ERRC proceeds with As-of-Right development of the Properties, it shall implement the mitigation measures specified in the FGEIS and summarized herein related to such development.

2. If ERRC proceeds otherwise, it shall submit its specific development plan for the Properties to all City and State agencies with jurisdiction over the plan.

3. In accordance with 6 NYCRR §§617.6(b)(2)(iii) and (b)(6)(i), the City and State agencies referenced in (1) shall decide amongst themselves as to the re-establishment of lead agency for purposes of evaluating ERRC's specific development plan. At that time, we will transfer lead agency status to the agency so selected.

4. The future Lead Agency shall determine: (a) whether ERRC's specific development plan for the Properties is consistent with the assumptions and parameters on which the FGEIS is based; (b) whether the significant adverse environmental impacts of the specific development plan have been adequately addressed and analyzed in the FGEIS and this Order; and (c) whether a supplemental EIS (SEIS) and/or Findings Statement must be issued. An SEIS shall be prepared if the future Lead Agency determines that the specific development plan may have one or more significant adverse impacts that were not addressed, or not adequately addressed, in the FGEIS and this Order, or if mitigation measures to be imposed with respect to any significant impact are materially different from those identified herein.

5. ERRC shall incorporate the mitigation measures specifically imposed on it by this Order in its specific development plan and implement those measures specified in the FGEIS and this Order.

6. To the extent we have provided ranges of mitigation measures, the future Lead Agency shall select from among the options specified in the FGEIS and summarized herein, and/or other measures it deems appropriate, to mitigate the significant impacts that have been identified. The future Lead Agency and other relevant agencies are permitted to refine and apply these mitigation measures in light of the impacts associated with ERRC's specific development plan. As part of any approval it issues, the future Lead Agency shall identify the specific mitigation measures to be implemented and determine the appropriate funding source for the mitigation consistent with customary practices in New York City.

7. The future Lead Agency shall also require ERRC to seek relevant approvals from and implementation by agencies with requisite jurisdiction for the mitigation measures in the areas of community facilities, traffic, transit, and pedestrians specified in the FGEIS and summarized herein. ERRC shall also consult and cooperate with all relevant agencies in connection with the implementation of such mitigation measures.

#### SEQRA Certifications

Based on the foregoing findings, we will not impose or approve any of the alternatives to the Development Scenarios and will not condition approval of the sale of the Properties on ERRC's undertaking of any specific development program described in the Development Scenarios. Subject to the conditions set forth in this Order, future governmental agencies to which ERRC submits its specific development plan for the Properties will have the discretion to review such plan, and, in accordance with appropriate procedures, determine the appropriate mix of uses, density and specific mitigation measures.

Based on the entire record related to this proceeding, and pursuant to 6 NYCRR §617.11, we certify that the requirements of SEQRA are fully satisfied. Consistent with the social, economic and other essential considerations from among the reasonable alternatives available, the Proposed Action and subsequent development of the Properties at the level contemplated by the Agreement, with the mitigation measures

discussed in the FGEIS and this Order, minimize or avoid significant environmental impacts to the maximum extent practicable. The Proposed Action and subsequent development of the Properties at the level contemplated by the Agreement are consistent to the maximum extent practicable with applicable policies set forth in Article 42 of the Executive Law (Local Waterfront Revitalization and Coastal Resources), as implemented by 19 NYCRR §600, and local Coastal Zone Management policies, including the City's Waterfront Revitalization Plan, and will achieve a balance between the protection of the environment and the need to accommodate social and economic considerations, discussed below.

### DISCUSSION

In evaluating a request for approval of a utility property transfer, we consider several factors, including efficacy of the auction process, purchase price and terms of sale, ability of the buyer to consummate the transaction, preservation of system reliability, and impacts on customers, employees and the environment. Based on our evaluation of these factors, and subject to the requirements and conditions discussed herein, we find that the proposed sale is in the public interest.

#### Auction Process and Pricing

Experience shows that an open, competitive auction process yields the maximum value for an asset, and we have consistently concluded that utilities should utilize this approach in their real property divestitures. Given the uniqueness of this transaction and the combined size of the Properties, there are no comparable sales and the pricing must be judged solely on the manner in which it was derived—the efficacy of the auction process.

Con Edison's multi-phase auction process was reasonable considering the property involved, the level of interest expressed by the bidders, and the complexity of the transaction. The initial proposal was sent to a broad spectrum of potential purchasers, and all were given the same opportunity to participate in the process. At each stage, the bidders were asked to improve their offers and maximize the value they placed on the

Properties. While we will not address the details of the bids or of the bid review process, we understand that all bids were objectively evaluated and considered. Based upon Staff's monitoring of the auction process, we are satisfied that it was properly conducted, unbiased, and effective. We are also satisfied that the auction process maximized ERRC's bid for the Properties and resulted in maximization of the value of the Properties.

Neither ERRC's bid nor the Agreement set a specific price; rather, they include a methodology for calculating the value of each property based on the level at which it is rezoned and developed. According to the estimates provided by Con Edison, the total purchase price could be as high as \$690 million. Even at the minimum price of \$350 million, which assumes no rezoning, the price exceeds the net book value of the Properties. Overall, because we find the structure of the auction to be reasonable, the pricing methodology it produced is also fair and reasonable.

#### The Purchaser

ERRC is a corporation whose members include two large real estate developers in New York City and investment funds managed by Morgan Stanley. Given the size and reputation of these entities, we are satisfied that they possess the requisite resources to consummate this transaction and satisfy ERRC's contractual obligations. As further support for our determination, we note that ERRC has already provided funding of approximately \$100 million for this transaction, and that it conducted a world-wide competition for choosing architects and planners to assist it in developing a comprehensive project plan for the Properties.

#### The Transaction Documents

There are a number of documents related to this transaction, but only one that is directly relevant for purposes of our consideration of the Petition—the Agreement. That document is also the only contract included with the Petition for which Petitioners seek approval.

In general, the Agreement, as amended, appears to properly describe the terms and conditions of the parties' purchase arrangement. It is appropriate to this transaction because it captures the value relating to the potential rezoning of the Properties and balances the timing of the environmental remediation activities with the obligations of Con Edison to sell and ERRC to purchase the Properties. It also fairly allocates the risks and liabilities Con Edison will retain and transfer. Due to the length of time between the date of execution and the expected date(s) of closing, the Agreement properly protects Con Edison's and its customers' interests by requiring ERRC to make certain deposits and post letters of credit for portions of the expected purchase price.

The allocation of responsibility for various taxes and costs is fair and does not impose upon Con Edison and its customers a preponderance of the liability. The treatment of environmental liabilities is also appropriate and reasonable given the ongoing environmental remediation at the Properties and the protections afforded by the TRC Contract and associated environmental insurance policies.

We do not find any labor issues related to the Agreement or to the transaction generally because no employees are to be transferred from Con Edison to ERRC. While some Con Edison employees have been relocated, and others will be when Waterside closes, the relocations are as much a result of our approval of the Steam Plan as they are a result of the sale.

### Reliability

The sale of the 616 and 708 First Avenue properties does not raise any reliability concerns. The 685 First Avenue and Waterside properties actively support Con Edison's utility operations and the impact of their sale on reliability must be considered.

#### A. 685 First Avenue

This site consists of an electric substation and a parking lot used by Con Edison employees and work crews. Under the Agreement, Con Edison will transfer the parking lot and the air rights over the substation to ERRC. Con Edison will retain and continue to operate the substation; it will also retain an area around the substation to

support substation activities (e.g., deliveries, maintenance and removal/replacement of equipment). While a specific plan for this property has not yet been developed, we understand that it is possible for a new building to be cantilevered over a portion of the substation. If such a design is constructed, our understanding of the terms of sale is that ERRC must maintain sufficient clearances to allow equipment to be hoisted out of and into the substation.

We have reviewed the relationship between the sale of this property with Con Edison's requirement to provide safe, adequate and reliable service to its customers. Con Edison appears to have reserved an adequate amount of space around the substation to permit it to operate, maintain, and conduct other activities at the substation. Based on the technical review of this matter performed by Staff, we agree that the remainder of the property is not needed to support the utility's operations and that reliability will not be adversely affected by the sale.

Because of the integral role the substation plays in maintaining system reliability and serving the local community, this approval is conditioned on Con Edison retaining full and unfettered access to, and the ability to safely operate and maintain, the substation. ERRC shall not develop the property in a manner that would inhibit or prevent Con Edison from satisfying this condition. To ensure that the public and any contractors working on the property are fully protected from risks arising from or related to the closeness of the substation, development of the site must comply, to the extent applicable, with all provisions of the National Electric Code, National Electric Safety Code, and other federal, state, and local electric safety regulations.

B. The Waterside Property

Waterside is an essential component of Con Edison's steam system. It is also an essential component of the electric system. The loss of either the steam or electric output from the plant, without a suitable and simultaneous replacement, could have serious deleterious consequences on the reliability of those systems and on Con Edison's ability to serve the needs of its customers.

When Petitioners executed the Agreement, ERRP was expected to be operational in 2003. It was not, and as of the date of this Order, Con Edison has not



announced an in-service date. Pursuant to the terms of the Agreement, it is possible that ERRC could require Con Edison to close on the sale of the Waterside property before ERRP is operational.

The initial stages of operation of a new power plant involve the monitoring of equipment performance and output, and periodic shut downs to make adjustments to or modify the plant's systems and equipment. In the case of ERRP, Con Edison intends to test and monitor the performance of the new equipment before commencing commercial operation. The duration of these activities is not yet known, so it cannot now be determined when Waterside will no longer be needed. Therefore, approval of the sale is also conditioned on Waterside remaining operational during the initial stages of ERRP's operation. The determination of the length of this period is left to Con Edison to make, in its business judgment and based on its PSL §§ 65 and 79 requirements to provide safe, adequate and reliable service to its customers. Additionally, Con Edison is not permitted to divest the Waterside property or to commence decommissioning of the plant until it is satisfied that ERRP is fully functional, all start-up issues are resolved, and Waterside is no longer needed to satisfy its statutory obligations. Con Edison shall provide at least 10 days' notice to us of the date after which Waterside can be decommissioned and the property sold.

The Waterside site also contains numerous facilities related to the operation of Con Edison's electric, steam, and gas transmission and distribution networks. In order for ERRC to develop the site, these facilities will need to be relocated to other Con Edison properties or within the streets and other rights-of-way. While there could be some disruptions in service occasioned by the relocation work, those disruptions are expected to be relatively minor. Nevertheless, Con Edison is directed to take all reasonable measures to minimize to the extent practicable all service losses and system interruptions. Overall, this work will not have a negative impact on system reliability.

#### Demolition and Remediation Activities

Con Edison's plan to decommission and demolish Waterside is separate from its request for approval of the sale of the Waterside property to ERRC. Rather, such

activities are considered a part of its utility operations for which pre-approval is not required. The inclusion of the TRC Contract with the Joint Petition was to provide background information and put the terms of the Agreement in context, to satisfy Con Edison's filing requirement under PSL §110(3), and to support the utility's request for recovery of the contract costs. For these reasons, we express no opinion about Con Edison's demolition and remediation activities, except as set forth above, and will not consider such activities in considering Petitioners' request for approval of the sale under PSL §§ 70 and 83.<sup>21</sup>

We accept the TRC Contract for filing, but as set forth below, we are deferring consideration of the accounting and rate treatment issues related to this matter, including recovery of the TRC Contract and other remediation-related costs. Any concerns parties may have with the reasonableness of such costs should be raised at the time we consider the accounting and rate treatment issues.

#### The Public Interest

Under PSL §§ 70 and 83, our consent is required before a utility may transfer any of its assets to a new owner. The consent is furnished if the transfer is in the public interest. Our analysis of the public interest is conducted on a case-by-case basis by examining the salient factors presented by each transaction. Among the factors we typically review are the price and details of the transaction, the ability of the purchaser to consummate the transaction and perform as required under the transaction documents, impacts on safety and reliability, the continued need by the selling utility for the assets, and environmental impacts. In larger transactions, we also evaluate impacts on the communities where the assets are located and which are served by the assets.

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<sup>21</sup> In response to concerns raised by some commentors, we note that Con Edison and TRC are required to comply with all applicable state and local requirements, including DEC Consent Orders for the Properties that prescribe the manner in, and extent to, which they will be remediated, and New York City Code requirements for demolition activities.

In this case, in addition to evaluating these factors, we must conduct a balancing because the transaction presents both substantial beneficial attributes and, on a localized basis, certain deleterious impacts. The sale is consistent with the Phase II Order, as well as our long-standing policy that utilities divest property that is no longer needed for their utility operations. With the repowering of East River, Waterside will no longer be needed to support Con Edison's electric or steam operations. Similarly, upon the closure of Waterside, the oil storage and handling facilities located at 616 First Avenue will no longer be needed, and the utility does not use, or have any need for, the remainder of that lot. While the parking lot on 685 First Avenue is convenient for Con Edison employees and work crews, the lot is not essential and the employees and crews have alternate parking locations. Staff examined Con Edison's need to retain the property for expansion of the electric substation located on its western end and reports that the utility retained an adequate amount of space to satisfy its needs for the foreseeable future. Since Con Edison was able to consolidate its operations and relocate all of the employees that formerly worked at 708 First Avenue, it has eliminated the need for the office building formerly located on that property. Therefore, Con Edison's operations, and its customers, will not be adversely impacts by the divestiture of any of the Properties.

If Con Edison continues to own the Properties, and so long as they remain used and useful, the utility's ratepayers will continue to bear the Properties' reasonable costs. The Petition indicates that the Properties have a net book value of approximately \$175 million; additionally, the utility incurs property taxes and other costs on them each year. By divesting the Properties, these continuing costs, which are also borne by ratepayers, will cease. Moreover, the amount of the proceeds is sufficient to pay off the remaining book cost and remove the Properties from the utility's rate base, with 100% of the net proceeds, which are expected to be substantial, inuring to customers' benefit.

The sale provides benefits to the City and the local community in that it will result in the use of the Properties for alternate, productive purposes, including the provision of new public open space. Other City and community benefits include and arise from ERRC's plan to reconnect the Properties to the community and to provide

greater access by the community across the Properties to the East River and East River Esplanade. Such reconnection has been a priority of the City and is consistent with the City's Waterfront Revitalization Program. In contrast, under Con Edison's past ownership, the community has not had access to the Properties or to the waterfront in that area. If we reject the Petition and deny the sale, the Properties would remain with Con Edison, and although the structures on them will likely still be demolished, there is no evidence before us that indicates that Con Edison would allow the community access on or through them. Thus, based on the evidence presented, the transfer provides greater opportunities to the City and local community.

The issue before us is not approval of the development of the Properties, but whether Con Edison should be permitted to sell them to ERRC. However, as required by SEQRA, we have, through the FGEIS, undertaken a comprehensive and exhaustive examination of the possible impacts that may arise from ERRC's development of the Properties. We have also identified, considered, and, as appropriate adopted or directed the future Lead Agency to adopt reasonable mitigation measures that would ameliorate the majority of the adverse impacts identified. Because there is no specific development plan for the Properties, our review was generic in nature, in which we looked at a range of possible development scenarios and alternatives for the Properties. In conducting this environmental review, we worked closely with the NYCDCP, consulted with other City and State agencies, and retained our own environmental consultant. As permitted by SEQRA, we also relied on the expertise of the environmental consultants retained by Petitioners who were responsible for performing the environmental analyses and preparing the DGEIS.

Based on this examination, we found that, with the exception of a few unmitigatable, temporarily unmitigatable, or potentially unmitigatable impacts, all potentially significant adverse impacts can be reasonably mitigated. Moreover, all of the entities mentioned above advised us that the mitigation measures set forth in the FGEIS and herein are the same as, or similar to, measures routinely adopted in environmental impacts statements by City agencies and utilized by those agencies in addressing actual problems encountered throughout the City.

While we acknowledge that some area residents would prefer more open space and less development, there is no publicly accessible open space on any of the Properties now, and there is no basis for us to conclude that Con Edison would create any such open space if we deny this Petition. Furthermore, the environmental review revealed that the proposed development of the Properties, which would occur only with our approval of the sale, would result in a number of benefits, including, but not limited to, increased economic development and housing and employment opportunities in Midtown Manhattan, the creation of hundreds to tens of thousands of construction and permanent jobs in New York City, millions of dollars of increased property tax and other revenues to New York City, and the creation of approximately 3.3 acres of publicly accessible open space in a section of Manhattan that currently has comparatively little open space.

SEQRA requires that we look at social, economic, and environmental factors together in reaching decisions on proposed actions (ECL §8-0103(7)) and proceed in a manner that “to the maximum extent practicable, minimize[s] or avoid[s] adverse environmental effects” (ECL §8-0109(1)). Based on the totality of these factors, and our generic evaluation of the potential environmental impacts and mitigation measures, we do not find any basis to modify the Agreement and limit the potential scale of the development. The limitation on the size of the development is an issue more properly addressed by New York City and its agencies via the City’s Uniform Land Use Review Procedure (ULURP) at such time as ERRC presents a specific development plan for the Properties and the specific impacts of that plan are identified and evaluated. Further, based upon the advice we received from NYCDCP, our consultant, and the others mentioned above, and upon our own analysis, we conclude that objections to the mitigation measures raised by some parties are without merit. Rather, we find that the measures are reasonable, appropriate, effective, and capable of implementation.

In sum, while we acknowledge our approval of the sale will lead to some potentially significant adverse environmental impacts, the majority of those impacts can be suitably mitigated. When the remaining impacts, of which there are relatively few, are balanced against the benefits to be realized from the sale, we find that the benefits

significantly outweigh the impacts. Con Edison's ratepayers, the local community, New York City, and New York State are better served by permitting this transaction to go forward essentially as proposed than by rejecting it or substantially limiting ERRC's ability to develop the Properties.

### Accounting and Rate Treatment

#### A. Allocation of Net Proceeds

In both the Phase II Order and Opinion No. 00-15 we deferred consideration of the allocation of the proceeds from the sale of the Properties to this proceeding. In the latter Order, we decided to utilize a portion of the proceeds allocable to the steam business to offset that business' accumulated depreciation reserve deficiency, provided the proceeds were received prior to the expiration of that rate plan, September 30, 2004.

In this proceeding, the comments we received are split on the issue of whether the allocation of the proceeds should be decided now or at a later date. Most of the commentators who discussed this issue focused on the allocation of the proceeds attributable to the Waterside property, and no consensus emerged on when and how the allocation should be decided.

Preliminarily, we will dispense with the extreme positions taken by some parties. The City and OCER contend that because of our decision to equalize electric delivery rates between the City and Westchester,<sup>22</sup> we should allocate the benefits of this transaction solely to New York City ratepayers. Westchester argues that we should allocate the steam business' portion of the net proceeds to electric ratepayers as consideration for prior subsidies which it believes electric ratepayers provided the steam system.

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<sup>22</sup> Case 00-E-1208, Consolidated Edison Company of New York, Inc.'s Plans for Electric Restructuring With Respect to Service Provided in Westchester County, Order Adopting Staff Proposal (November 25, 2003); Order Denying Rehearing (issued April 15, 2004) (MAC Orders).

In the MAC Orders, we considered similar allocation issues raised by these parties and determined that there was no basis to assign stranded or strandable costs to particular customers because Con Edison made no distinctions among particular customers when it acquired or constructed its generating assets. In this case, Waterside was not constructed or maintained specifically or solely for New York City customers. Therefore, the same analysis applies and the City/OCER proposal is rejected.

As for Westchester's argument, the assignment of incremental costs of steam production to the steam business and the balance of the generation costs to the electric business is a reasonable ratemaking mechanism for stabilizing steam rates.<sup>23</sup> We have also found the allocation of the costs of the Properties between electric and steam to be reasonable.<sup>24</sup> In considering this very issue, the Courts agreed that our approach was reasonable and refused Westchester's request to set aside our determinations.<sup>25</sup> We find no basis presented in this case to disturb our prior determinations regarding this allocation issue and provide electric ratepayers with more than their equitable share of the net proceeds. Therefore, we also reject Westchester's recommendation.

Turning to the primary issue, Con Edison proposes to allocate the proceeds attributable to the 616, 685, and 708 First Avenue properties using the utility's common utility plant or other allocation percentages in effect as of the date the Agreement was executed. As to the Waterside property, Con Edison proposes to allocate the proceeds in the same manner it proposes to allocate ERRP's costs between the steam and electric businesses—a ratio of approximately one-third to two-thirds. However, Con Edison reports that, historically, a greater percentage of Waterside's costs have been allocated to the electric business.

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<sup>23</sup> See, e.g., Opinion No. 00-15, fn 10 and p. 18.

<sup>24</sup> Id. at p. 18; see also Case 27276, Consolidated Edison Company of New York, Inc. – Steam Rates, Opinion No. 78-27 (issued November 14, 1978).

<sup>25</sup> County of Westchester v. Helmer, 296 A.D.2d 68 (3d Dep't 2002); appeal denied 99 N.Y.2d 502 (2002).

With the exception of the general allocation arguments advanced by the City, OCER, and Westchester, there were no objections to the utility's specific allocation proposal for the 616, 685, and 708 First Avenue properties.<sup>26</sup> We find that the utility's proposal for those properties fairly and equitably balances the interests of Con Edison's electric, gas, and steam ratepayers. It appropriately allocates to each group a share of the proceeds in equivalent proportions to the costs each group has borne related to those properties. After our approval of this transaction, the closing of these properties could occur later this year. Con Edison recently filed major gas, steam, and electric rate cases, and it may be important, or at least informative, to the parties in those cases to know the portion of the proceeds that will be attributable to each business.<sup>27</sup> For this reason, it is appropriate to decide the allocation issues for these properties now, and we approve the utility's proposed allocations.

As to the Waterside property, neither the utility nor any party discussed the propriety of using the historic allocation ratio and apportioning the benefits produced from the sale in the same manner in which the costs were recovered from ratepayers. The record on this alternate approach should be developed before a final decision on the allocation is made. For these reasons, we defer consideration of the allocation of the Waterside property's net proceeds and encourage the parties to reach consensus on the allocation methodology. Staff is directed to convene a meeting of the parties at the appropriate time, and in the appropriate venue, to discuss this matter. In the event the

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<sup>26</sup> The City also recommended that the determination of the allocation be deferred until Con Edison's Lower Manhattan reconstruction costs are known. Since the December 5 Notice was issued, Con Edison petitioned for deferral of those costs and included them in its steam and electric rate cases. Given these intervening events, this issue no longer constitutes a separate basis to delay consideration of the allocation issue.

<sup>27</sup> Parties should not interpret this statement as requiring that the proceeds be addressed in the rate cases. We recognize that there is significant uncertainty surrounding the actual closing date(s); our intent is to provide guidance to the parties on the potential magnitude of the proceeds for each business in the event they choose to factor such information into their positions or recommendations.



parties cannot reach consensus, Con Edison shall include its proposed allocation of the proceeds in a compliance filing submitted 120 days after the sale of the property.

B. Use of Net Proceeds

While some parties would have us decide on the use of the net proceeds now, others are concerned that sufficient information does not exist to allow for a reasoned decision on their appropriate use. Those parties recommend that we wait until the actual amount is known, and until we have a more complete understanding of the Lower Manhattan redevelopment infrastructure costs Con Edison may incur. One party, EMCSD, believes that there should be more discussion among the parties on this issue before any recommendations are made.

We agree with the recommendations for deferring consideration of the actual use of the proceeds within each business until the proceeds are received. In making this determination, we are cognizant of our prior decision to use a portion of the steam business' share of the proceeds. Inasmuch as the term of the rate plan approved by that Order expires before Con Edison is likely to receive the proceeds, and a new rate case is now pending, it may be appropriate to revisit our prior decision. Thus, the parties are requested to consider this issue and the use of the proceeds in the pending steam rate case (Case 03-S-1672).

To properly decide on the use of the proceeds, we, and the parties, need to know the net amount available for use. This net amount, which is based on the gross proceeds from the sale, the utility's transaction costs, applicable taxes, the net book costs of the Properties, and other adjustments, will not be known until after closing. In order to allow the parties to engage in informed discussions on and make appropriate recommendations to us as to the use of the proceeds, we direct Con Edison to make a filing, within 120 days of closing, showing and supporting the costs and proceeds associated with this transaction.

C. Venue for Consideration of Open Issues

The reasonableness of the utility's transaction expenses and other deductions from the gross proceeds should be considered comprehensively. We will do so in this proceeding upon receipt of the compliance filing described above.

However, the most appropriate venue for considering the use of each business' share of the net proceeds is in a rate case. Therefore, we direct Con Edison to defer the net proceeds, with interest at the unadjusted customer deposit rate pending their disposition in the pending or future electric, gas, and steam rate cases, as appropriate.<sup>28</sup>

### Procedural Comments

#### A. Timing and Scope of Solicitation of Comments

EREC, EMCSO and a few other commentors objected to our solicitation of comments before we completed the DGEIS, arguing that such request violates SEQRA. These arguments are moot because, after completion of the DGEIS, the Secretary to the Commission solicited comments anew on all aspects of the Joint Petition.<sup>29</sup>

With respect to public involvement, we conducted eight public statement hearings, with large notices of each hearing placed in numerous local newspapers for three to four weeks before the hearing. We also relaxed our requirements for submission of comments to facilitate and simplify the ability of interested persons to participate in the process and provide comments (e.g., we allowed single copies of comments to be submitted and accepted comments in writing, by e-mail, or via our telephone opinion line). Based on the large attendance at the hearings and the volume of comments we received from the public, we find no basis to EMCSO's contention that our outreach efforts were inadequate.

#### B. Use of Proceeds for SEQRA Mitigation Measures

A few commentors recommend use of a portion of the net proceeds to mitigate the potential impacts of the development of the Properties. The FGEIS explains that it is premature to make determinations about funding for mitigation because of the

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<sup>28</sup> All interested parties will have the opportunity to conduct discovery and express their views and recommendations on the appropriate usage of the proceeds in such proceedings.

<sup>29</sup> Case 03-E-1231, supra, Notice Soliciting Additional Comments (issued September 26, 2002).

absence of a specific development plan for the Properties. Additionally, the obligation to fund mitigation measures typically resides with a project sponsor. In this case, the impacts identified in the FGEIS arise from the development of the Properties, not the sale. ERRC, not Con Edison, will develop the Properties. Thus, Con Edison's ratepayers are not responsible for funding ERRC's mitigation obligations.<sup>30</sup>

### CONCLUSION

The sale of the Properties provides substantial benefits to Con Edison's ratepayers, the local community, New York City, and the State as a whole. While the environmental review associated with this transaction and ERRC's potential development of the Properties identified a number of potentially significant adverse impacts, the vast majority of them can be adequately mitigated. The remaining few unmitigatable, or potentially unmitigatable, impacts of the development of the Properties are outweighed by the benefits to be obtained from the sale.

We are satisfied that the auction process for the Properties was properly conducted and that ERRC possesses the ability to consummate the transaction and accomplish its obligations under the Agreement. We find no reliability or other concerns that indicate that this transaction would be adverse or harmful to Con Edison, its utility operations, or its ratepayers' interests. Therefore, as required by PSL §§ 70 and 83, we find that this transaction is in the public interest and authorize Con Edison to proceed with its consummation.

#### The Commission orders:

1. Consolidated Edison Company of New York, Inc.'s sale of four parcels of real property comprising approximately 9.2 acres of land located at 616 First Avenue, 685 First Avenue, 700 First Avenue, and 708 First Avenue to East River Realty

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<sup>30</sup> We note that in the case of ERRP, where Con Edison is the project sponsor, the utility and its ratepayers will provide funding of \$4.25 million to be used by the local community to provide environmental and other benefits in the area around the plant.

Company, LLC, formerly known as FSM East River Associates LLC, is approved, in accordance with the requirements, and subject to the conditions, set forth in the body of this Order.

2. The November 15, 2000 Agreement between Consolidated Edison Company of New York, Inc. and East River Realty Company, LLC, as amended, is approved in accordance with the requirements, and subject to the conditions, set forth in the body of this Order.

3. Consolidated Edison Company of New York, Inc. shall not commence decommissioning activities at its Waterside Steam Station, or divest the property known as 700 First Avenue, until the East River Repowering Project commences commercial operation and the utility has provided 10 days' notice to the Commission that Waterside is no longer necessary for it to satisfy its obligation to provide safe, adequate, and reliable service to its customers.

4. In conjunction with this decision and pursuant to the State Environmental Quality Review Act, the Commission hereby makes a written statement of findings as set forth in the body of this Order.

5. East River Realty Company, LLC shall undertake and implement the mitigation measures specified in, and satisfy the obligations imposed on it by, the Final Generic Environmental Impact Statement and the body of this Order.

6. Consolidated Edison Company of New York, Inc. shall defer the net proceeds it receives, with interest at the unadjusted customer deposit rate pending their disposition as discussed in the body of this Order.

7. No later than 120 days following the closing of the sale and transfer of each of 616, 685, 700, and 708 First Avenue, Consolidated Edison Company of New York, Inc. shall file with the Commission a statement of the amount of proceeds it received, the costs it incurred, and a proposed accounting and ratemaking treatment for the net proceeds, in accordance with the requirements of this Order. In the case of 700 First Avenue, in the event the allocation of the proceeds among the utility's electric and steam businesses has not been decided by the date of closing, the utility shall also include its proposed allocation of the proceeds in its filing.

8. Consolidated Edison Company of New York, Inc. and East River Realty Company, LLC shall submit to the Secretary of the Commission written statements of unconditional acceptance of the conditions contained in this Order, signed and acknowledged by duly authorized officers of each company, within 10 business days of the date of this Order.

9. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING  
Secretary