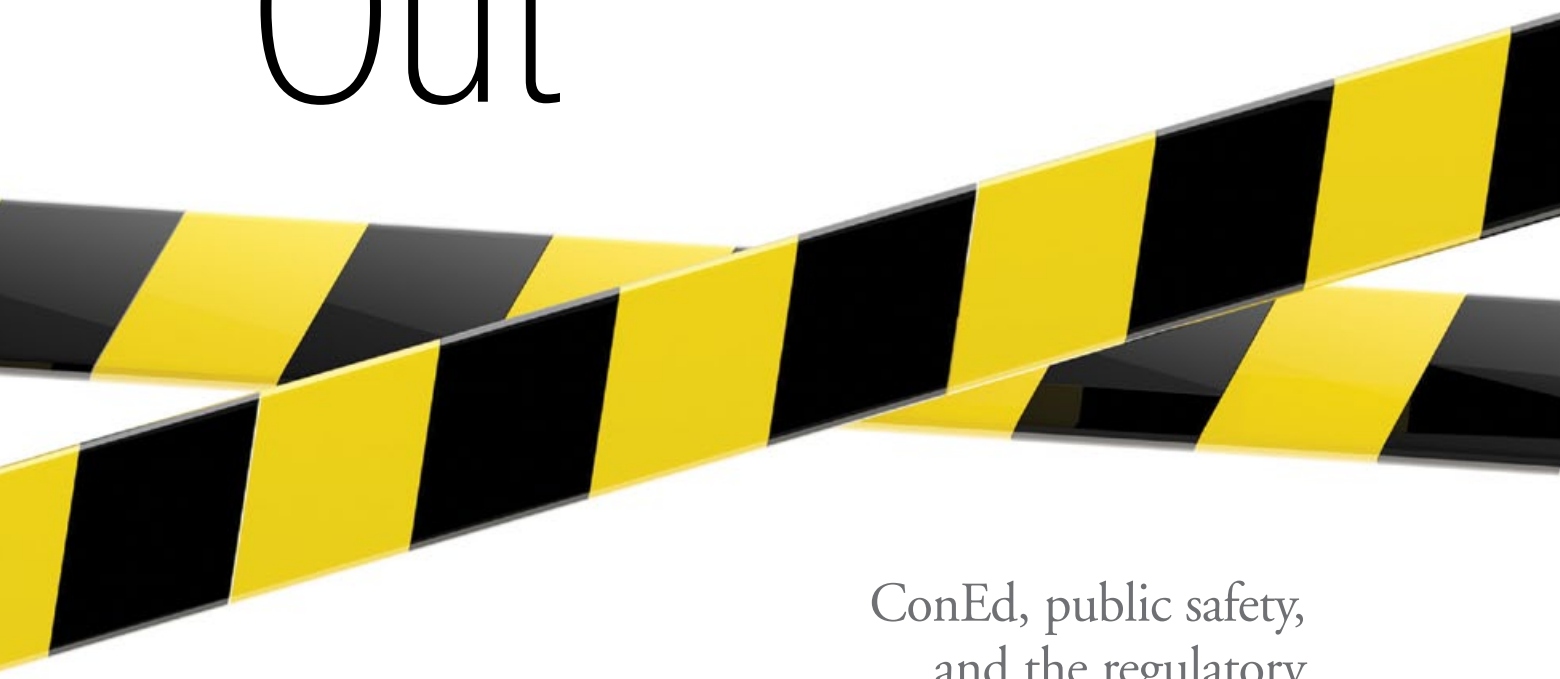
When Labor's Locked Out



ConEd, public safety, and the regulatory response.

By Scott Strauss and Peter Hopkins

Consolidated Edison Company of New York made history in July 2012, when it imposed the largest-ever labor lockout in New York state. Following the expiration of a collective bargaining agreement between ConEd and the Utility Workers Union of America Local 1-2, ConEd sent home the 8,000 craft union employees responsible for operating and maintaining the utility's electric, gas, and steam services to more than 3 million customers in New York City and Westchester County. The company undertook to provide service through a makeshift workforce of management employees, retirees, and contractors, but ConEd admitted that it suspended certain significant utility services. As the lockout dragged into a fourth week and summer temperatures soared, New York Governor Andrew Cuomo expressed concern that "there is a real possibility of a safety or reliability issue if [the lockout] situation continues. This is especially true as our region faces an ongoing heat wave which places significant stress on the power grid and requires all parties to devote the highest level of attention to the energy system."[1]

After 27 days, the lockout ended with the completion of a new collective bargaining agreement. The final negotiations involved Governor Cuomo, who had entered the talks the day after a State Assembly hearing in Manhattan on the crisis. That hearing included testimony concerning the scope of the authority of the New York State Public Service Commission (PSC). The union had asked the PSC to end the lockout on the ground that ConEd could not continue to provide safe and reliable service without its skilled and experienced workforce. That PSC proceeding terminated only when ConEd and the union agreed to a new contract.

And while that agreement obviated any need for the PSC to take immediate action against ConEd, the case raises a broader issue: How should state utility commissions address the conflicts between enforcing the statutory service obligations of regulated entities and their right to use economic weapons to resolve labor-management conflicts?

At a minimum, ConEd's decision to lock out its employees, and thereby seek an advantage in its labor negotiations, did not excuse the company of its statutory obligation to continue to provide utility services. Similar to other public utility statutes across the nation, New York law provides that it is the "policy of this state that the continued provision of … gas, electric and steam service to all residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest."[2] In furtherance of this policy, ConEd has the statutory obligation to "furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable."[3]

To be sure, the affected ratepayers view questions concerning labor negotiations and the legality of the lockout under federal labor law[4] as academic and remote, especially when weighed against the prospect of losing power to their homes and businesses, being electrocuted from stray voltage, or falling through a defective manhole grating because of substandard utility service. Indeed, ConEd itself long ago urged a narrow application of federal labor law, pointing out that "[b]ecause of … the functional dependence of New York City and Westchester County and the millions of their inhabitants upon the petitioners' services, the local interest in petitioners' uninterrupted supply of their services is predominant and paramount."[5]

ConEd was using some of its 5,000 managers, plus about 700 retirees and contractors, to do the work of its 8,000-member union.

In seeking to maintain safe and reliable service, state utility commissions asked to act during a labor dispute involving a regulated entity might face challenging preemption questions. While the boundary lines are by no means clear, regulated utilities plainly owe statutory obligations that should not be treated as dispensable in order to strengthen the utility's bargaining position.

The PSC Intervenes

Ten days into the lockout, the union filed a motion with the PSC asking it to initiate and conduct an investigation into the quality, reliability and safety of the service ConEd was providing during the lockout.[6] The union also sought interim relief in the form of an order directing the company to terminate the lockout during the pendency of the investigation.

There was good cause for concern. In conjunction with the lockout, ConEd was using some of its 5,000 managers,

Scott Strauss and **Peter Hopkins** are partners at Spiegel & McDiarmid. The attorneys represented the Utility Workers Union of America and UWUA Local 1-2 in their case against ConEd before the New York PSC in July 2012.

supplemented with some 700 retirees and contractors, to do the work ordinarily performed by its 8,000-member union workforce. According to the union, managers were expected to work 12-hour shifts, six days a week. Many, if not the vast majority, had never performed field work. A little more than a third of its current managerial workforce had come up through the ranks as union employees.

Based upon the company's own statements, the union noted that ConEd had suspended most meter reading and closed a number of walk-in centers, in apparent violation of state statutory obligations.[7] The union also alleged that ConEd was jeopardizing public safety and service reliability by, among other things, not performing proper stray voltage inspection and repair, transformer inspections, and manhole inspections, and also unduly relying on temporary repairs, and not adequately supporting customer conversions from oil to gas service in connection with New York City's elimination of the use of No. 2 fuel oil. These were significant concerns grounded in recent and tragic experience. In 2004, a Columbia University graduate student was electrocuted when she stepped on a snow-covered Con Edison junction box in Manhattan. Her death prompted the implementation by ConEd of new measures to detect and remediate stray voltage. ConEd typically operates 10 to 14 stray voltage detection vehicles.

Moreover, as the union noted, the list of specific services not being performed was "merely illustrative of the obvious" rather than exhaustive. As the union argued, "5,000 managers cannot perform, and cannot be performing, the full complement of operations and maintenance work that is routinely performed on a day-to-day basis by 8,500 field personnel who possess the requisite skills, training and experience to do that work."[8]

The PSC directed the company to answer the union's motion. The company sought dismissal, advancing three principle supporting arguments. First, ConEd contended that during the lockout customers were receiving the "same … service" that they were receiving prior to the lockout.[9] Second, ConEd claimed that the lockout was in furtherance of public safety, arguing that it "had no reasonable alternative but to institute a lockout to avoid the extreme adverse consequences to customers and the general public of a strike without notice."[10] ConEd claimed that it could not properly operate its systems without 72 hours' advance notice of a strike.[11] Third, ConEd argued that the PSC was preempted by federal labor law and that "the lockout action … can only be reviewed by the NLRB."[12]

ConEd's own pleading revealed that customers were not receiving the same quality and level of service during the lockout as had been the case before its initiation. The company itself identified a substantial number of routine but important utility operations that had been suspended during the lockout, including all planned capital and project work for its transmission and substation operations, gas operation main replacement and system reinforcement, and lower priority gas leak repairs. The company admitted to operating only one stray voltage inspection vehicle, instead of the typical 10 to 14.

In its reply, the union identified additional shortcomings. Among other things, the union asserted that routine manhole inspections (and the electronic documentation of these procedures) to ensure the structural integrity of the manhole, prompt necessary repairs, and protect against stray voltage were not performed. Cable was pulled across the ground prior to being placed in conduit, which can result in damage and tears and ultimately cable failure, stray voltage, fires and explosions. In suspending meter reading, the company also suspended the associated hot socket inspections, which are performed to prevent meter fires and thus building fires. In at least some circumstances, managers or contract workers performing work on elevated structures had dispensed with safety tethers in gross violation of company safety standards. During the lockout, ConEd implemented voltage reductions in Manhattan, the Bronx and elsewhere, and used mobile generators—a disaster response measure—to provide service in Bensonhurst. ConEd claimed that these measures were not necessitated by the lockout.

As the lockout dragged on, Gov. Cuomo voiced concern: "there is a real possibility of a safety or reliability issue."

The union was not the only informed observer that saw problems. A ConEd management employee is reported to have told the *New York Times*: "As long as nothing major happens, we can maintain the system," noting further that "Obviously the longer it goes, the heat is going to take a toll."[13] In public comments filed with the PSC, a commenter identified as a New York City Fire Department battalion chief stated in part that: "I have seen firsthand the temporary repairs that have been made recently, to restore power to a Con Ed customer. There is no longer a command structure when operating at an incident with Con Ed. Hopefully nothing tragic happens to a family or home owner by a tempo[r]ary repair all for the sake of trying to prove a point."[14]

Memo to the Governor

On July 25, 2012, the chairman of the PSC sent a letter memorandum to the governor in response to his request that the Commission "examine the maximum legal authority and fullest extent of [PSC] jurisdiction over disputes between regulated utilities and their labor unions."[15] The memo stated that "[f]ederal labor law precludes any state entity, including the Public Service Commission, from ordering a … public utility to end a labor-management dispute, such as a strike or lockout." The chairman went on to state that if ConEd's lockout contingency plan failed

"to prevent a severe event compromising safety or disrupting the provision of reliable service [this] could expose the utility to a claim that it acted imprudently and trigger corrective action by the Commission."[16]

The governor took "respectful" issue with the chairman's letter and suggested "an alternative perspective" that was "proactive[e]" and did not depend upon the occurrence of a severe event compromising safety or reliability.[17] The governor noted that "[w]hen we can take steps to avert disaster before it strikes, it is a dereliction of our public duty not to act. In the case of the current ConEd lockout, it would be a failure to serve the public to respond only after a blackout or serious safety incident that occurs due to the labor dispute." The governor urged the chairman "to bring both parties together to … encourage an expeditious resolution." The governor met the next day with both sides, precipitating a resolution of the lockout and a new collective bargaining agreement.

The approach suggested in the PSC chairman's letter is relatively passive as concerns the commission's authority over regulated utilities. As a threshold matter, there should be no doubt that a state utility commission is free to investigate a regulated utility's performance in the course of a company lockout, the NLRA notwithstanding. This is not a trivial observation. There is much truth in Justice Brandeis' famous observation that "sunlight is said to be the best of disinfectants."[18] State commissions can use their investigatory powers to inform themselves and the public as to what utility services are and are not being provided during a lockout. They can bring internal company documents to light and require company officials to provide public testimony. All of this can be highly instrumental in informing and shaping public opinion. In answering the union's motion, ConEd provided a significant amount of information making clear some of the services it was failing to provide due to the lockout. The spotlight shined on ConEd as a result of the PSC proceeding—and the New York legislative hearings—brought forth information that otherwise would not have been publicly disclosed.

Confronting Federal Preemption

While there is no language in the National Labor Relations Act that expressly preempts state law, the Supreme Court has identified two types of potential NLRA preemption, identified here by the names of the cases in which they were addressed.

First, *Garmon* preemption "forbids state and local regulation of activities that are 'protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8.'"[19] Second, *Machinists* preemption "prohibits regulation of areas that Congress intended to be left 'unregulated and to be controlled by the free play of economic forces.'"[20]

These limitations notwithstanding, it would also appear to be the case that a state commission can direct a regulated utility not to curtail services during a lockout. Such a directive is neither PSC regulation of a lockout nor regulation in an area that Congress intended be free of regulation. ConEd was paid its tariffed rates during the lockout and there would appear to be no good (or preemptive) reason why it, or any similarly situated regulated utility, could not be directed to provide the full complement of services for which it is being paid. There is no basis to infer that Congress intended to "deprive [state utility commissioners of their traditional] power to act"[21] during a lockout. As a corporation can seek to bring in replacement workers during a lockout, a utility commission need not abide the cessation or reduction of utility services and operations during a lockout.

The more significant, and apparently undecided issue, however, is whether a state utility commission can direct a utility to end the lockout of some or all of its union workforce in order to provide safe and reliable service. Strong public safety and health concerns can accompany a lockout. Replacement workers might not be available in sufficient numbers and with sufficient skills to ensure the provision of critical operations. By way of example, the union asserted that ConEd had brought in contract workers from Alabama who had little to no experience working on a primarily underground utility system. The United States District Court for the Eastern District of New York has noted that the Supreme Court's federal preemption decisions "appear strongly to support the conclusion that the Supreme Court would … take into consideration 'the historic police powers of the State includ[ing] the regulation of matters of health and safety.'"[22] Accordingly, "legitimate public safety concerns might well warrant an exemption from pre-emption."

The apparently undecided issue is whether the state PSC can tell the utility to end a lockout to ensure safe and reliable service.

The issue would appear to be even more sharply framed when viewed from the converse perspective: did Congress intend for no governmental body to be able to ensure the provision of safe and reliable utility service during a lockout? The National Labor Relations Board assesses labor practices, but does not regulate matters of public utility safety. Yet someone or something must fill the void.

Governor Cuomo might well have had it right: in the case of a utility lockout it "is a dereliction of … public duty not to act" and ensure the provision of safe and reliable service before disaster strikes. F

Endnotes:

1. *Available at* http://www.governor.ny.gov/press/07252012Lock-Out
2. New York Public Service Law, Art. 4, § 30.
3. Pub. Serv. Law §65 (gas and electric service); §79 (steam service).
4. "[T]here is no express provision in [the National Labor Relations Act] … authorizing the lockout." *NLRB v. Truck Drivers Local Union No. 44,* 353

U.S. 87, 92 (1957). Nevertheless, the United States Supreme Court has recognized an employer's qualified right to lock out its union workforce in certain circumstances including "'as a safeguard against loss where there is a reasonable ground for believing that a strike [is] threatened or imminent.'" *American Ship Building v. NLRB,* 380 U.S. 300, 307 (1965) (quoting Quaker State Oil Refining Corp., 121 NLRB, 334, 337). The legality of the ConEd lockout was raised before the National Labor Relations Board and is not the focus of this article.

5. *Consolidated Edison Co. v. NLRB*, 305 U.S. 107, 203 (1938).
6. Request for Investigation of Utility Workers Union of America, AFLCIO, Local 12, Utility Workers Union of America, New York Central Labor Council and New York State AFLCIO, Case No. 12M0306.
7. Public Service Laws §§ 39(1) and 65(13)(b).
8. Motion at 12-13.
9. Response at 33.
10. *Id.* at 6.
11. Notwithstanding the company's claimed need for a 72-hour notice period prior to any strike, the new collective bargaining agreement contains no pre-strike notice requirement.
12. *Id.* at 42.
13. *Available at* http://www.nytimes.com/2012/07/18/nyregion/con-ed-managers-splice-cables-or-hold-flashlights.html.
14. *Available at* http://documents.dps.ny.gov/public/MatterManagement/Details.aspx?CommentSeq=4691.
15. PSC Letter at 1.
16. *Id.* at 2. The chairman also noted that the commission "has no statutory authority over labor unions."
17. Governor's Letter.
18. L. Brandeis, "What Publicity Can Do," *Harper's Weekly* (1913).
19. *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218, 224 (1993) quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).
20. *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996) (quoting *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).
21. *Garmon*, 359 U.S. at 244.
22. *Van-Go Transp. Co. v. New York City Bd. of Educ.*, 53 F. Supp 2d 278, 291 (E.D.N.Y. 1999) (quoting *De Buono v. NYSA-ILA Medical and Clinical Servs. Fund*, 520 U.S. 806, 814 (1997).