

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRD REGION**

**ROCHESTER GAS & ELECTRIC CORPORATION**

**and**

**Cases 03-CA-075635  
03-CA-081230**

**LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO**

**COUNSEL FOR GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS TO THE DECISION OF  
THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii-v

I. INTRODUCTION..... 1

II. ARGUMENT..... 2

**A. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) and (5) OF THE ACT WHEN IT FAILED TO GIVE TIMELY NOTICE AND AFFORD THE UNION AN OPPORTUNITY TO BARGAIN ABOUT THE EFFECTS OF SUBCONTRACTING THE MANDATED GAS WALKING SURVEY TO HEATH CONSULTANTS. (17 ALJD 12-19 ALJD 3; 24 ALJD 17-20, 42-44; R Exc. 1, 3, 4, 12, 14-17, 22-24, 30, 31, 37)**..... 2

        1. The ALJ correctly concluded that Respondent had an obligation to provide notice and an opportunity to meaningfully bargain about the effects of subcontracting the mandated gas walking survey prior to implementation. (17 ALJD 25-44; 18 ALJD 1-31; R Exc. 1, 3, 4, 12, 16) ..... 3

        2. The ALJ properly concluded that Respondent failed to meet its effects bargaining obligation regarding the subcontracting of the mandated gas walking survey. (24 ALJD 17-20, 42-44; R Exc. 1, 3, 4, 12, 14, 15, 16, 17, 22, 23, 24, 31, 37) ..... 4

**a. Respondent failed to properly provide adequate notice and an opportunity to bargain. (R Exc. 1, 3, 4, 15-17, 22, 23, 31)**..... 4

**b. The Union did not waive its right to engage in effects bargaining over the subcontracting of the mandated gas walking survey. (R Exc. 14)**..... 10

**c. The subcontracting of the mandated gas walking survey was more than *de minimis* and impacted unit employees. (R Exc. 23, 24, 37)**..... 11

**B. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) and (5) OF THE ACT BY UNREASONABLY DELAYING IN PROVIDING RESPONSIVE INFORMATION TO THE UNION AS RELATED TO SEVEN SUBCONTRACTORS. (13 ALJD 14 –17 ALJD 8; 24 ALJD 30-40; R Exc. 2, 8, 10, 11, 13, 17, 18, 29-33)** ..... 15

|             |  |           |
|-------------|--|-----------|
| 1.          | <u>The ALJ appropriately concluded that Respondent unreasonably delayed in providing relevant and necessary information for effects bargaining concerning the seven subcontractors.</u> (R Exc. 2, 8, 10, 11, 13, 17, 18) .....  | 15        |
| 2.          | <u>The ALJ correctly rejected Respondent’s defenses to the alleged unreasonable delay in providing information.</u> (R Exc. 29-33).....  | 22        |
| <b>C.</b>   | <b>THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) and (5) OF THE ACT WHEN IT FAILED TO GIVE TIMELY NOTICE AND FAILED TO AFFORD THE UNION AN OPPORTUNITY TO BARGAIN ABOUT THE EFFECTS OF SUBCONTRACTING FOR SEVEN SUBCONTRACTORS. (19 ALJD 5 – 24 ALJD 20; 24 ALJD 42-44; R Exc. 1, 3-7, 9, 12-16, 18- 21, 25-28, 34-36, 38).....</b> | <b>26</b> |
| 1.          | <u>The ALJ correctly concluded that Respondent violated its obligation to bargain over the effects of each specific instance of subcontracting.</u> (R Exc. 1, 3, 4, 12, 15, 16, 18, 26) .....   | 27        |
| 2.          | <u>The ALJ appropriately concluded that Respondent failed to demonstrate that the Union clearly and unmistakably waived its right to effects bargaining.</u> (R Exc. 3, 5-7, 9, 13-15, 19-21, 25-28, 34-36, 38).....   | 31        |
| a.          | <b>The ALJ correctly found the Union did not waive its right to bargain over the effects of subcontracting through the express provision of the contract.</b> (R Exc. 5, 9, 14, 27) .....  | 32        |
| b.          | <b>The ALJ appropriately concluded the Union did not waive its right to effects bargain after examining the parties’ bargaining history.</b> (R Exc. 6, 14, 20, 28) .....  | 33        |
| c.          | <b>The ALJ appropriately rejected Respondent’s arguments that the Union waived the right to effects bargain because of its past conduct, and that the Union had received notice outside of 10(b) of subcontracting.</b> (R Exc. 3, 7, 13-15, 19, 21, 25, 26, 34-36, 38).....   | 37        |
| <b>D.</b>   | <b>THE ALJ CORRECTLY CONCLUDED THAT A REMEDY UNDER <u>TRANSMARINE NAVIGATION CORP.</u>, 170 NLRB 389 (1968), WAS APPROPRIATE; BUT GENERAL COUNSEL HAS FILED CROSS-EXCEPTIONS OVER THE MODIFICATIONS. (24 ALJD -27 ALJD; R Exc. 39-42) .....</b>  | <b>48</b> |
| <b>III.</b> | <b><u>CONCLUSION</u> .....</b>   | <b>49</b> |

## TABLE OF AUTHORITIES

### Cases

|  |                                      |
|--|--------------------------------------|
| <u>AG Communication Systems Corp.</u> , 350 NLRB 168, 173 (2007) .....                 | 48                                   |
| <u>Allegheny Power</u> , 339 NLRB 585, 587 (2003) .....                                | 15, 24                               |
| <u>Allison Corp.</u> , 330 NLRB 1363 (2000) .....                                      | 3, 8, 14, 16, 17, 28, 29, 32, 33, 34 |
| <u>Art’s Way Vessels, Inc.</u> , 355 NLRB 1142 (2010) .....                            | 45                                   |
| <u>Beverly California Corp.</u> , 326 NLRB 153 (1989) .....                            | 15                                   |
| <u>Caterpillar, Inc.</u> , 355 NLRB No. 91 (2010) .....                                | 43                                   |
| <u>Clear Channel Outdoor, Inc.</u> , 346 NLRB 696 (2006).....                          | 9                                    |
| <u>Comar, Inc.</u> , 349 NLRB 342 (2007) .....   | 26                                   |
| <u>Courier Journal</u> , 342 NLRB 1093 (2004) .....                                    | 43                                   |
| <u>Dorsey Trailers, Inc.</u> , 321 NLRB 616 (1996) .....                               | 19                                   |
| <u>E.I. DuPont de NeMours &amp; Co.</u> , 346 NLRB 553 (2006).....                     | 26                                   |
| <u>E.I. DuPont de Nemours, Louisville Works</u> , 355 NLRB No. 176 (2010) .....        | 43                                   |
| <u>East Coast Steel, Inc.</u> , 317 NLRB 842 (1995) .....                              | 47                                   |
| <u>Enloe Medical Center</u> , 343 NLRB 470 (2004) .....                                | 14, 31, 33, 34                       |
| <u>First National Maintenance</u> , 452 U.S. 666 (1981) .....                          | 3, 27                                |
| <u>FirstEnergy Generation Corp.</u> , 358 NLRB No. 96 (2012).....                      | 43                                   |
| <u>Good Life Beverage Co.</u> , 312 NLRB 1060 (1993).....                              | 26                                   |
| <u>Good Samaritan Hospital</u> , 335 NLRB 901 (2001).....                              | 14                                   |
| <u>Hospital Español Auxilio Mutuo de Puerto Rico, Inc.</u> , 342 NLRB 458 (2004) ..... | 39                                   |
| <u>Hospital San Cristobal</u> , 358 NLRB No. 89 (2012) .....                           | 19                                   |
| <u>Johnson-Bateman Co.</u> , 295 NLRB 180 (1989).....                                  | 31, 34, 44, 46                       |

|   |              |
|---|--------------|
| <u>Kelly’s Private Car Service</u> , 289 NLRB 30 (1988) .....   | 42           |
| <u>KGTV</u> , 355 NLRB No. 213 (2010) .....   | 33           |
| <u>KIRO, Inc.</u> , 317 NLRB 1325 (1995) .....  | 3, 32        |
| <u>Leach Corp.</u> , 312 NLRB 990 (1993) .....  | 45, 46       |
| <u>Live Oak Skilled Care &amp; Manor</u> , 300 NLRB 1040 (1990).....  | 14, 19, 48   |
| <u>Local Union 36, Intern. Brotherhood of Elec. Workers, AFL-CIO v. NLRB</u> , 706 F.3d 73 (2d Cir. Jan. 17, 2013)..... | 32           |
| <u>Los Angeles Soap Co.</u> , 300 NLRB 289 (1990) .....   | 3, 8, 10, 27 |
| <u>Melody Toyota</u> , 325 NLRB 846 (1998) .....  | 48           |
| <u>Metropolitan Edison Co. v NLRB</u> , 460 U.S. 693 (1983) .....   | 31           |
| <u>Miami Rivet of Puerto Rico, Inc.</u> , 318 NLRB 769 (1995) .....   | 5, 29, 47    |
| <u>Mission Foods</u> , 345 NLRB 788 (2005).....   | 23           |
| <u>Monmouth Care Center</u> , 354 NLRB 11 (2009) .....  | 15           |
| <u>National Car Rental Systems, Inc.</u> , 252 NLRB 159 (1980).....   | 10, 34       |
| <u>Pennsylvania Power Co.</u> , 301 NLRB 1104 (1991).....   | 23           |
| <u>Piggly Wiggly Midwest LLC</u> , 357 NLRB No. 191(2012) .....   | 48           |
| <u>Pratt Industries</u> , 358 NLRB No. 52 (2012).....   | 40           |
| <u>Public Service Co. of Colorado</u> , 312 NLRB 459 (1993).....  | 28, 29, 46   |
| <u>Rochester Gas &amp; Electric Corp.</u> , 355 NLRB No. 86 (2010).....   | 3, 14, 32    |
| <u>Sea Mar Community Health Center</u> , 345 NLRB 947 (2005) .....  | 39           |
| <u>Sea-Jet Trucking Corporation</u> , 327 NLRB 540 (1999).....  | 48           |
| <u>Taylor Hospital</u> , 317 NLRB 991 (1995).....   | 23           |
| <u>The Bohemian Club</u> , 351 NLRB 1065 (2007).....  | 30           |
| <u>Transmarine Navigation Corp</u> , 170 NLRB 389 (1968) .....  | 3, 48        |

|   |                      |
|---|----------------------|
| <u>Trojan Yacht</u> , 319 NLRB 741 (1995) .....                       | 32                   |
| <u>U.S. Postal Service</u> , 308 NLRB 547 (1992) .....                | 15                   |
| <u>United Technologies Corp.</u> , 274 NLRB 504 (1985).....           | 31                   |
| <u>Westinghouse Electric Corp.</u> , 150 NLRB 1574, 1576 (1965) ..... | 39, 40               |
| <u>Willamette Tug &amp; Barge</u> , 300 NLRB 282 (1990) .....         | 4, 5                 |
| <u>Woodland Clinic</u> , 331 NLRB 735 (2000).....                     | 4, 5, 10, 15, 21, 27 |

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EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 (d)(1) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief in response to Respondent's Exceptions to the Administrative Law Judge's Decision in the above-captioned cases.

**I. INTRODUCTION**

On March 6-8, April 17-19, and May 13, 2013, a hearing concerning this matter was held before Administrative Law Judge Steven Davis. On January 8, 2014, Administrative Law Judge (ALJ) Steven Davis issued his Decision and Order.<sup>1</sup> The ALJ concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing or refusing to bargain with the Union by failing to timely furnish the Union with requested relevant and necessary information in paragraphs 1, 5, and 6 of its August 29, 2013 information request. Furthermore, the ALJ

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<sup>1</sup> Administrative Law Judge Steven Davis will be referred to herein as ALJ. All references herein to the Administrative Law Judge's Decision, JD(NY)-01-14, will be ALJD, with the page number preceding ALJD, and the line number after ALJD. (\_\_\_ALJD \_\_\_). The transcript will herein be cited as (Tr. \_\_\_). Respondent's Exceptions will herein be cited as: (R Exc. \_\_\_). Respondent's February 3, 2014 Brief in Support of Exceptions will be herein cited as Respondent's BSE, p. \_\_\_. All references to General Counsel's, Respondent's and Charging Party's exhibits will herein be GC Exh. \_\_\_, R Exh. \_\_\_, and CP Exh. \_\_\_ respectively.

concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing to give timely notice and by failing to afford the Union an opportunity to bargain over the effects of its decision to subcontract bargaining unit work to Heath Consultants, and to seven named subcontractors. (24 ALJD 30-44).

On February 3, 2014, Respondent filed its Exceptions and Brief in Support of Exceptions. Respondent objects to several credibility, factual and legal findings made by the ALJ. The General Counsel maintains that Respondent's Exceptions are without merit and that the ALJ's findings are supported by the record and by extant Board law.

## **II. ARGUMENT**

### **A. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) and (5) OF THE ACT WHEN IT FAILED TO GIVE TIMELY NOTICE AND AFFORD THE UNION AN OPPORTUNITY TO BARGAIN ABOUT THE EFFECTS OF SUBCONTRACTING THE MANDATED GAS ALKING SURVEY TO HEATH CONSULTANTS. (17 ALJD 12 -19 ALJD 3; 24 ALJD 17-20, 42-44; R Exc. 1, 3, 4, 12, 14-17, 22-24, 30, 31, 37).**

The ALJ correctly concluded that Respondent unlawfully failed to give timely notice to the Union and afford the Union an opportunity to bargain with it over the effects of its decision to subcontract unit work – the mandated gas walking survey – to Heath Consultants Incorporated (Heath). (24 ALJD 17-20, 42-44; R Exc. 1, 3). The ALJ, supported by the record and case law, properly determined that pre-implementation effects bargaining had not taken place regarding Respondent's subcontracting to Heath, notwithstanding the Union's August 29, 2011 request for bargaining. (18 ALJD 29-31).

1. The ALJ correctly concluded that Respondent had an obligation to provide notice and an opportunity to meaningfully bargain about the effects of subcontracting the mandated gas walking survey prior to implementation. (17 ALJD 25-44; 18 ALJD 1-31; R Exc. 1, 3, 4, 12, 16).

The ALJ properly concluded that an employer must give notice and opportunity to a union to bargain regarding the effects of a decision in a meaningful manner and in a meaningful time. (17 ALJD 25-28; R Exc. 4, 16). See First National Maintenance, 452 U.S. 666, 681 (1981); KIRO, Inc., 317 NLRB 1325, 1327 (1995) (“An employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself.”).

Likewise, contrary to R Exc. 12 and 16, in which Respondent contends effects bargaining can occur after the implementation of subcontracting, the ALJ properly concluded, based upon well-established case law, that an employer is required to provide pre-implementation notice and an opportunity for meaningful effects bargaining to occur. (17 ALJD 40-45; 18 ALJD 1-10). See Allison Corp., 330 NLRB 1363, 1366 (2000) (by failing to give prior notice and an opportunity to engage in meaningful negotiations regarding the effects of its lawful decision to subcontract unit work, the employer violated its effects bargaining obligation); See also Los Angeles Soap Co., 300 NLRB 289, 295 n. 1 (1990) (pre-implementation notice is required to satisfy the obligation to bargain over effects). An employer cannot engage in meaningful effects bargaining after it has already implemented its decision. See Rochester Gas & Electric Corp., 355 NLRB No. 86, slip op. at 2 (2010), *quoting* Transmarine Navigation Corp., 170 NLRB 389 (1968) (Respondent’s unfair labor practice deprived the Union of “an opportunity to bargain at a time prior to [implementation of the decision] when such bargaining would have been meaningful in easing the hardship on employees.”).

Moreover, the ALJ soundly concluded that proper notification requires that effects bargaining must occur sufficiently before actual implementation of the decision so that the union is not presented with a *fait accompli*. (18 ALJD 6-9). See Woodland Clinic, 331 NLRB 735, 737-738 (2000) (meaningful time for effects bargaining was before the closure was implemented' to avoid the union from being confronted with a *fait accompli*); see also Willamette Tug & Barge, 300 NLRB 282, 282-3 (1990) (finding the union was entitled to as much notice of the closing and termination of employees as was needed for meaningful bargaining at a meaningful time, and that union was entitled to sufficient notice before actual implementation so that the union is not confronted with a *fait accompli*).

2. The ALJ properly concluded that Respondent failed to meet its effects bargaining obligation regarding the subcontracting of the mandated gas walking survey. (24 ALJD 17-20, 42-44; R Exc. 1, 3, 4, 12, 14-17, 22, 23, 24, 31, 37).

- a. **Respondent failed to properly provide adequate notice and an opportunity to bargain.** (R Exc. 1, 3, 4, 15, 16, 17, 22, 23, 31).

For a general recitation of the facts for this Answering Brief, see 2 ALJD – 13 ALJD.

Here, the ALJ, supported by the record and case law, correctly concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide adequate notice and an opportunity to meaningfully bargain concerning its subcontracting of the mandatory gas walking survey work to Heath. (24 ALJD 17-20, 42-44; R Exc. 1, 3). Notwithstanding the Union's August 26, 2011 verbal demand to bargain, its August 29, 2011 written demand to bargain over effects, and a written information request, Respondent commenced the subcontracting to Heath on September 6, 2011.<sup>2</sup> (Tr. 13-15, 50, 53, 57, 515, 894; GC Exh. 4, 6,

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<sup>2</sup> Heath Consultants continued to perform the mandated gas walking survey through October 15, 2011 in the towns of Brighton and Webster, New York. At the same time, unit employees simultaneously worked on the mandated gas walking survey at other locations, and thereafter through November 28, 2011. (Tr. 13-15, 515, 894; GC Exh. 6; 6 ALJD 2-5; 18 ALJD 23-24; 18 ALJD 28-29).

28; 6 ALJD 2-12, 31-33; 13 ALJD 29-30; 18 ALJD 15-18, 23-24, 28-29). Respondent had an obligation to provide the Union with an opportunity to engage in effects bargaining before implementing its subcontracting on September 6, 2011. (Tr. 13-14, 515, 894). Willamette Tug & Barge, 300 NLRB 282, 282-3 (1990). The Respondent failed to do so. The first time Respondent offered to bargain with the Union about the work subcontracted to Heath Consultants, was in its September 16, 2011 response letter, post-implementation. (Tr. 63-64; GC Exh. 5; 8 ALJD 28-34; 18 ALJD 23-29). The ALJ appropriately noted that the September 16 response still did not identify the subcontractor at issue or provide complete information about the subcontracting. (18 ALJD 26-28; Tr. 63-64; GC Exh. 5).

The ALJ correctly analyzed that Respondent's failure to fulfill the Union's August 29, 2013 information request prior to implementation of the mandated gas walking survey, also precluded meaningful bargaining. (18 ALJD 23-52; 19 ALJD 1-3). Miami Rivet of Puerto Rico, 318 NLRB 769, 772 (1994) (union is not required to begin bargaining at a time when relevant information is being unlawfully withheld). (17 ALJD 33-38; R Exc. 17).<sup>3</sup>

Respondent contends in its BSE, pp.29-30, and R Exc. 15, that it gave sufficient prior notice to the Union by informing the Union on August 26, 2011 about the subcontracting, 11 days in advance of the implementation. However, the record reflects that it presented the Union with a *fait accompli*, which did not adequately provide for the possibility of meaningful bargaining. Woodland Clinic, 331 NLRB 735, 738 (2000). First, the notification was vague, at best. The record establishes that on August 26, 2011, Ed Pozzuolo, Respondent's manager, gas operations, contacted Union business manager Rick Irish by telephone. According to Irish,

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<sup>3</sup> It should be noted that General Counsel does not separately allege that Respondent failed to provide information or unreasonably delayed in providing information responsive to the August 29, 2011 information request regarding the Heath subcontracting. (GC Exh. 1(o)).

(corroborated by his notes in GC Exh. 4), Pozzuolo informed Irish that Respondent would not be in compliance on the mandated survey, and as a result, a subcontractor would be performing the mandated gas walking survey “after the first of September.” Pozzuolo did not identify the subcontractor and did not provide additional details regarding the subcontracting itself. In response, Rick Irish objected and demanded effects bargaining. Pozzuolo had no response. (Tr. 50, 53; GC Exh.4; 5 ALJD 43-46; 6 ALJD 7-12).

During the conversation, Irish also stated that the Union would be following up with an information request and a letter regarding the Union’s demand for effects bargaining. (Tr. 50). Irish also proposed that underground utility inspectors and other qualified unit members could do the work on overtime, instead of subcontracting it. (Tr. 50; 6 ALJD 7-10). It should be noted that Respondent did not elicit any testimony from Pozzuolo, a witness who testified at the hearing, regarding this conversation. (Tr. 948-1000). Furthermore, the record establishes that on August 26, 2013, Respondent already had made plans to start Heath in a particular municipality to perform the gas walking survey. (GC Exh. 90, Tr. 900-901).

On August 29, 2011, the Union issued its demand to bargain over the effects of subcontracting, and its request for information. (GC Exh. 28). Notwithstanding the request to bargain, Respondent then entered into a pricing arrangement with Heath on August 30, 2011 in the midst of the outstanding information request/demand to bargain. Respondent did not even suggest, until its September 16 correspondence, ten days after it began implementation, that it was willing to engage in effects bargaining. Moreover, the letter did not identify the subcontractor or provide pertinent details regarding subcontracting. (Tr. 63-64, 895-896, 908-

909; GC Exh. 5, 28; 8 ALJD 28-34; 18 ALJD 23-29). As such, Respondent's conduct reflected a predetermination to implement the subcontracting to Heath Consultants, while foreclosing the possibility of bargaining over effects topics prior to such implementation.

Respondent contends Pozzuolo's telephone conversation on August 26 constituted ample notice, in light of the updates it had been providing to the Union during the "open items" meetings. (BSE, p. 29). However, as late as the August 2011 "open items" meetings, Respondent, while acknowledging that the mandated survey was lagging, stated that unit employees continued to exclusively work on the mandated walking survey, and did not even suggest that a portion of the mandated gas walking survey would be subcontracted.<sup>4</sup> (Tr. 48-49, 502, 504-506, 883-885; 5 ALJD 29-39). Moreover, the real issue was not Respondent's periodic updates about the mandated gas walking survey, but its complete failure to provide the type of notice that afforded the Union with a meaningful opportunity to bargain about the effects of subcontracting prior to implementation.

Respondent contends that it could not practically bargain over the effects of the subcontracting of the mandated gas walking survey prior to implementation, because time "was of the essence" in meeting its NYSpsc compliance, in the first place. (BSE, p. 30). In addition, Respondent contends that concerns about impending severe weather emergencies, not only made it difficult to get information to the Union sooner, but also in effect, impeded Respondent's

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<sup>4</sup> The mandated gas walking survey had commenced earlier in April 2011 and in accordance with Respondent's expressed plan to the Union, had been performed exclusively by unit employees until September 6, 2011. Contrary to R Exc. 22, the ALJ appropriately found that Respondent's manager of gas operations, Edward Pozzuolo and Respondent told the Union, during "open items" meetings (held on February 17, April 14, and August 2011), that unit employees would be performing the mandated surveys, while having a contractor perform the newly instituted "incremental" non-mandated gas walking survey. During the course of an August 2011 open items meeting, Respondent informed the Union that unit employees continued to perform the mandated gas walking survey and the subcontractors continued to perform the incremental survey. From April through August 2011, Respondent never mentioned to the Union any intention of having subcontractors perform the mandated gas walking survey. (Tr. 48-49, 502, 504-506, 883-885; 4 ALJD 21-22; 5 ALJD 20-23, 29-39; R Exc. 22).

ability to timely engage in effects bargaining. (BSE, pp. 14, 16 and 30; R Exc. 31).

However, whatever the particular circumstances, Respondent still had a legal obligation to engage in meaningful pre-implementation effects bargaining with the Union. Allison Corp., 330 NLRB 1363, 1366 (2000); Los Angeles Soap Co., 300 NLRB 289, 295 n. 1 (1990). Respondent kept detailed records of its mandated gas walking survey progress, which arguably should have provided warning signs of its insufficient progress.<sup>5</sup>

These detailed records also demonstrate the availability of information to readily respond to the information request. (Tr. 511). It is difficult to fathom that a vast corporation could not gather particular information about subcontracting a portion of the mandated gas walking survey, for a finite period, to a single contractor. The record accurately reflects that Respondent, by Director of Labor Relations Jay Shapiro, immediately passed along the Union's August 29 request to counsel and other managers, such as Respondent's Labor Relations Lead Advisor Thomas Cammuso, who was in the office not dealing with storm events. (Tr. 1087-1089; 1110-1111, 1117; GC Exh. 120, 140; R Exc. 31). While Respondent contends in R Exc. 31, Ed Pozzuolo was deeply involved in the recovery, and thus as a result, Respondent could not possibly have timely responded, there is no indication on the record as to Mr. Pozzuolo's absence from his office during the storm recovery, or why other Labor Relations officers could not have responded to the information request or engaged in effects bargaining negotiations. (Tr. 993-994). Pozzuolo even testified that Cammuso contacted him for overtime records responsive to the information request shortly after August 29, 2011. (Tr. 835).

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<sup>5</sup> Contrary to R Exc. 23, the ALJ properly found that Ed Pozzuolo acknowledged that it was possible that if earlier in the year it had started increasing unit employees' overtime, by August 2013, Respondent might not have been in the situation it found itself. Even if it cost more initially, Respondent could have instituted five, ten-hour days sooner for unit employees, obviating the need for subcontracting. Respondent's constant assessment of its progress potentially could have arguably led to an earlier evaluation of circumstances than Pozzuolo's mid-August 2011 decision. (Tr. 511, 907-908; R Exc. 23; 6 ALJD 14-18).

The record reflects that at no point in time, did Respondent indicate to the Union that it could not provide responsive information regarding Heath, or that it could not engage in effects bargaining, because of storm emergency events. (Tr. 523-524). Nor is this alleged impediment mentioned in Respondent's September 16, 23 and October 11, 2011 responses to the Union, regarding the subcontracting to Heath. (GC Exh. 5, 6, and 7; Tr. 64-66).

In addition, the impact of natural disasters or storm emergencies is arguably a foreseeable event in the utility industry, and should not excuse Respondent from its effects bargaining obligations to provide relevant information and to meet with the Union. The ALJ correctly rejected the argument that the storm emergencies prevented provision of information or bargaining. (R Exc. 31; 18 ALJD 49-52; 19 ALJD 1-3). There was no extraordinary economic exigency here that would have excused Respondent's conduct. See Clear Channel Outdoor, Inc., 346 NLRB 696, 704 (2006). Rather, the record reflects that Respondent regularly monitored the potential storm situations and planned responses accordingly. (Tr. 888-889, 1007-1008). Here, arguably, storm emergencies, even severe ones, are par for the course in a utility's business operations and should not be considered an extraordinary event. (Tr. 217-218, 229, 325-326, 411-412 (Hurricane Sandy), 614, 836). Pozzuolo even testified that it was not unusual for unit employees to work vast amounts of overtime in response to major storms, such as tropical storms or hurricanes. (Tr. 836; R Exc. 23). Hence, the ALJ appropriately rejected Respondent's argument that it should be excused from providing advance notice of subcontracting because of natural disasters due to two hurricanes. (18 ALJD 38-40; R Exc. 31).

Moreover, Irish testified that he did not recall Pozzuolo on August 26 mentioning the impending storms as a reason for the subcontracting. (Tr. 161). Likewise, the ALJ correctly

found that it does not appear that the work was subcontracted because of the storms or damage resulting from them; but rather to complete the survey on time. (18 ALJD 40-47; R Exc. 31).

**b. The Union did not waive its right to engage in effects bargaining over the subcontracting of the mandated gas walking survey.** (R Exc. 14).

Respondent in its BSE, p. 29, and R Exc. 14, contends that the Union waived its right to bargain, due to the Union's failure to ask for effects bargaining dates regarding the subcontracting of the gas walking survey in response to Respondent's September 16 and 23 correspondence. (Tr. 65-67, 896, 1098; GC Exh. 6,7; 8 ALJD 48-53, 9 ALJD 1-15; 18 ALJD 33-36). However, when an employer fails to provide the union with pre-implementation notice of a change that will impact conditions of employment, the union can never waive its right to effects bargain. Los Angeles Soap Co., 300 NLRB 289, 295-96 (1990); National Car Rental Systems, Inc., 252 NLRB 159, 163 (1980) (union did not waive its right to effects bargaining where the employer's announcements of closing and terminations as a *fait accompli* precluded request to bargain over effects, and clearly indicated any attempt at bargaining would have been futile). On September 16, 2011, the Union was not obligated to engage in effects bargaining over the subcontracting of the mandated gas walking survey to Heath Consultants post-implementation, without the requested necessary information to bargain, and after the commission of the unfair labor practice. Woodland Clinic, 331 NLRB 735, 737 (2000). As Irish testified, the Union did not respond with effects bargaining dates for the Heath subcontracting, because it appeared futile, inasmuch as the implementation was a "done deal," and the Union did not have all of its requested information. (Tr. 64, 167-169).

**c. The subcontracting of the mandated gas walking survey was more than *de minimis* and impacted unit employees.** (R Exc. 23, 24, 37).

Respondent asserts that the failure to bargain about the effects of the Heath subcontracting should be dismissed, because it amounted to *de minimis* subcontracting. Respondent contends in its BSE, pp. 30-31, and in R Exc. 37, that the Heath subcontracting was *de minimis*, because it was less than 10% of all of the work; significantly less than had been performed by the contractor in the past; and unit employees were already performing overtime while subcontracting occurred, capping their potential for any additional overtime.

Respondent's arguments should be rejected. In GC Exh. 90, an August 26 internal e-mail, it reflects that the Heath subcontracting was being commenced in locations in "jeopardy of date compliance." The selection of two municipalities, for subcontracting of the mandated distribution survey, from September 6 through October 15, reflects where Respondent wanted to maximize its efforts at the time of its decision in mid-August 2011; hence two vital areas to the completion of the project. Furthermore, a September 22, 2011 internal e-mail with attachments, GC Exh. 92, at p. 6 (a spreadsheet entitled 2011 Walking Survey) reflects that through a portion of the subcontracting to Heath, (up to week ending September 16, 2011), the total contractor cost was \$2,426.90, more than a *de minimis* amount. Presumably, the costs continued to increase through Heath's completion of its mandated gas survey work in October 2011.

In addition, it is irrelevant whether a larger portion of the mandated distribution survey had been subcontracted in the past, since the interjection of the "incremental" survey for the first time in 2011 completely transformed the landscape of past practice. Notwithstanding whether Respondent ultimately subcontracted less than 10% of its mandated work, or a lower percentage in the past, to Heath, it is undisputed that the mandated gas walking survey constituted unit work over which the Union had timely requested to bargain the effects of subcontracting. (Tr. 45-46,

1002; R Exh. 156, p.1, entries #2-30, DIMP Leak survey, column F – labeled as bargaining unit work). It is further undisputed that the 2011 subcontracting of the mandated portion clearly deviated from Respondent's plan, which was relied upon by the Union, of having unit employees exclusively perform the mandated gas walking survey. (Tr. 48-49, 502-506, 883-885).

Contrary to Respondent's assertions, Heath's subcontracting did have a material and significant impact upon unit employees' lost overtime opportunities. Respondent contends in its BSE, pp. 13-14, that it could not have all unit employees work on the survey because not all unit employees were qualified to do so, and they had other mandated work to complete. However, the record reflects that qualified unit employees were both available and willing to work overtime or even additional overtime to complete the gas walking survey, notwithstanding Respondent's false claim that no such evidence exists. (R Exh. 24; Tr. 392-399, 508-513, 914-915, 1006-1007; GC Exh. 25). First and foremost, contrary to Respondent's arguments and exceptions (R. Exh. 23 and 24), even though Respondent placed some employees on overtime, the record establishes unit employees could have worked additional overtime performing the gas walking survey. The ALJ properly summarized Pozzuolo's testimony regarding the possibility that unit employees from other departments could perform the mandated survey. (Tr. 907-908, 914-915; 6 ALJD 20-24; R Exh. 23, 24).

For example, the record reflects that underground utility inspector Mark Welch, who was performing stakeout work, was qualified to perform the mandatory gas walking survey work and had done so in the past. The record establishes that Welch was available September through October 2011 to perform the mandated gas walking survey work, after his normal shift and on weekends. (Tr. 392-394; 395-396; GC Exh. 25 (paystubs)). In addition, Welch testified regarding approximately 16 other underground utility inspectors in the gas maintenance and

operations department, performing stakeout work during the same hours as Welch, who were also qualified and willing to work the mandated gas walking survey in September through October 2011. Welch also testified that construction and maintenance crews working 7:00 am to 3:00 pm were qualified to perform mandated gas walking survey work; and could have arguably done so after 3:00 pm. (Tr. 396-399).

Likewise, crew leader and union official, Craig Rode testified that he and his crew could have performed additional overtime each night, and could have worked on weekends to complete the mandated gas walking survey. (Tr. 512-513). Furthermore, Rode testified that excluding his own crew, around 11 other qualified underground utility inspectors working 8-hour shifts, some of whom were working in stakeouts, could have performed the gas walking survey on an overtime basis. (Tr. 513). In addition, Rode testified that there were other classifications, working only 8-hour shifts, who were operator qualified to perform the gas walking survey: senior service employees; and gas construction and maintenance crews, including first class pipe men (4), gas technicians (16) and gas foremen (9). (Tr. 513-514, 1006-1007).

Respondent contends in its BSE, p.30, that it had foreclosed the need for effects bargaining, because it already addressed safety concerns by separating Heath employees from working in the same town as unit employees on the survey. Respondent's contention that there would have been nothing left to bargain about related to the effects of subcontracting should be rejected. The record establishes that the parties could have discussed returning underground utility inspector (UUI) employees who were previously forcibly transferred in November 2010 to the corrosion control department, to perform the survey work. (Tr. 493-494, 543-544). The parties could have also discussed increased overtime for UUI employees performing stakeout work, such as Mark Welch, and other unit classifications qualified to perform gas walking survey

work, or increased overtime for the crews, such as Craig Rode's crew, already working on the gas walking survey. Other issues for possible discussion include compensation in lieu of overtime and safety concerns about Heath's performance. (Tr. 392-399; 493; 508-514; 543-44; 1006-1007; GC Exh. 25, 28).

Union business manager Irish testified the parties could have bargained about the following effects related to subcontracting to Heath: 1) safety concerns (such as particular safety rules that applied to Heath or safety inspections of Heath's work) and the type of safety training afforded the subcontractors; and (2) proposals related to the size of the unit, compared with the number of subcontractors. (Tr. 69; 6 ALJD 10-12). Moreover, the potential topics would have been limited only by the imagined possibilities, since "the obligation to provide notice and opportunity to bargain about effects is not conditioned on the view of the judge or the Board as to what, if any, effects will be identified or how they will be resolved by the parties." Good Samaritan Hospital, 335 NLRB 901, 903 (2001); see also Enloe Medical Center, 343 NLRB 470, 476 (2004).

The ALJ correctly concluded that Respondent failed to provide the Union with an opportunity to engage in meaningful bargaining at a meaningful time regarding the effects of subcontracting the mandated gas walking survey. (R Exc. 1, 3, and 4; 17 ALJD 25-28; 18 ALJD 29-31; 24 ALJD 17-20, 42-44). Allison Corp., 330 NLRB 1363, 1366 (2000). Respondent offered to bargain about the effects after it had already implemented the subcontracting, thus depriving the Union with a meaningful opportunity to bargain. The Union may have been able to secure additional benefits for unit employees had the Respondent engaged in timely effects bargaining. Rochester Gas & Electric, 355 NLRB No. 86, slip op. at 2 (2010), quoting Live Oak Skilled Care & Manor, 300 NLRB 1040 (1990).

**B. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) and (5) OF THE ACT BY UNREASONABLY DELAYING IN PROVIDING RESPONSIVE INFORMATION TO THE UNION AS RELATED TO SEVEN SUBCONTRACTORS. (13 ALJD 14 – 17 ALJD 8; 24 ALJD 30-40; R Exc. 2, 8, 10, 11, 13, 17, 18, 29-33).**

The ALJ correctly concluded that Respondent's almost seven month delay from August 29, 2011 to March 20, 2012 in furnishing relevant and necessary information concerning subcontracting responsive to paragraphs 1, 5 and 6 of the August 29, 2011 information request was unreasonable, and violated Section 8(a)(1) and (5) of the Act. (16 ALJD 20-26; 16 ALJD 20-26; 17 ALJD 6-8; R Exc. 2, 8, 13, 17).

1. The ALJ appropriately concluded that Respondent unreasonably delayed in providing relevant and necessary information for effects bargaining concerning the seven subcontractors. (R Exc. 2, 8, 10, 11, 13, 17, 18).

The ALJD effectively laid out the well-established standards for analyzing the relevancy of the August 29, 2011 information request. (13 ALJD 37-52; 14 ALJD 1-28; see cases cited therein). Likewise, the ALJ properly concluded that an employer is obligated to supply relevant information to the union in a timely and complete manner. (15 ALDJ 49-51; 16 ALJD 1-12, 20-26). The union is entitled to the information at the time it makes its initial request, and it is the employer's duty to furnish it as promptly as possible. Monmouth Care Center, 354 NLRB 11, 51 (2009). In evaluating the promptness of a response, the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information. Allegheny Power, 339 NLRB 585, 587 (2003). (16 ALJD 9-12). The Board has found that anywhere from a few weeks to a few months constitutes an unreasonable delay.<sup>6</sup> (See also 15 ALDJ 49-51; 16 ALJD 7-12, 20-26).

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<sup>6</sup> See U.S. Postal Service, 308 NLRB 547, 550 (1992) (four-week delay unlawful); Monmouth Care Center, 354 NLRB 11, 52 (2009) (six-week delay unreasonable); Woodland Clinic, 331 NLRB 735, 737 (2000) (seven-week delay unreasonable); Beverly California Corp., 326 NLRB 153, 157 (1989) (two month delay unlawful) and the other cases cited by the ALJ in 16 ALJD 20-26.

The ALJ appropriately found relevant to the Union's performance of its representative duties paragraphs 1 (information related to the details of subcontracting, the subcontract and any communications from and to the subcontractor); 5 (information related to subcontractor training); and 6 (information related to subcontractor supervision), of the August 29, 2011 request. (6 ALJD 34-49; 7 ALJD 1-44; 14 ALJD 45-46; 15 ALJD 29-30; R Exc. 2, 10, 11). The ALJ properly found that the requested information related to subcontracted work which employees were capable of performing, and as such was "clearly relevant to the Union's efforts to engage in effects bargaining." (14 ALJD 48-49).

Likewise, to the extent that the August 29 request sought non-unit information regarding subcontractors (i.e., the request for the contract with the subcontractor, and communications with the subcontractor in paragraph one), the ALJ properly found that the Union had a reasonable basis for believing that the information would be necessary to the Union in carrying out its statutory obligations – formulating effects bargaining proposals. Allison Corp., 330 NLRB 1363, 1367 (2000). (15 ALJD 15-17). The record testimony and the face of the August 28, 2011 request itself articulated that the requested information was necessary to engage in meaningful bargaining, and to intelligently formulate proposals in effects bargaining.<sup>7</sup> Allison Corp., 330 NLRB 1363, 1366 (2000) (15 ALJD 1-9, 25-30; Tr. 58-59, 61-62, 286-291; 337; R Exc. 11).

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<sup>7</sup> GC Exh. 28, Paragraph 1 explains that it seeks the identity, description, copy of the contract, and communications, to ascertain the impact upon the workload, hours, and pay of affected employees. The Union witnesses testified as to the relevance in formulating proposals related to overtime, alternative staffing arrangements and potential safety implications. Likewise, GC Exh. 28 explains that the rationale for paragraph 5, seeking skills and training of subcontractors, is to assess safety concerns for the unit employees. Irish and Sondervan testified that the Union requested #5, (subcontractor training and skills) because the Union needed to know the safety implications of contractors' work upon its membership including to be able to respond to emergency calls, to assist in formulating effects bargaining proposals related to safety requirements for subcontractors. Finally, paragraph 6, seeking information about the supervision of subcontractors' work and the qualifications of the supervisors of the subcontractors states that the information is necessary to ascertain the employer of the workers and safety implications. The Union witnesses reflected that rationale, indicating the information might reveal possible disciplinary implications for unit employees if they had to supervise, or whether unit employees were properly being compensated for additional supervisory duties. (Tr. 58-59, 61-62, 286-291, 337; 15 ALJD 1-9, 17-23).

The ALJ also appropriately found that the Union repeatedly informed Respondent that it needed the information to effectively engage in effects bargaining, determine the impact of Respondent's subcontracting upon the unit, and assess future anticipated effects upon the unit. Allison Corp., *supra*, at 1368. (15 ALJD 25-30; 16 ALJD 14-18; R Exc. 2). Specifically, the ALJ noted that on February 1, 22, and 23, Union business manager Sondervan informed Respondent that it needed the information to make educated effects proposals. (15 ALJD 32-37; GC Exh. 12; Tr. 297-298, 308-309, 311, 332; 10 ALJD 24-32 ). If Respondent had engaged in timely effects bargaining, Union business agents Irish and Sondervan testified that they would have made proposals regarding the loss of overtime opportunities, proposals concerning the safety issues presented by the contract employees and proposals to address the long-term stability of the bargaining unit. (Tr. 69, 328-329, 332, 335; 15 ALJD 1-9, 17-23; 19 ALJD 45-49).

In R Exc. 10, Respondent generally excepts to the ALJ's conclusion that the requested information was relevant to effects bargaining over safety issues. More specifically, in R Exc. 11, Respondent specifically excepts to the finding that the portion of paragraph 1 seeking "all communications from and to the subcontractors" was relevant to determine which employees had adequate safety. The ALJ, supported by record evidence, accurately summarized the Union's testimony, and held that communications from and to the contractor in paragraph 1 sought to determine whether safety training of contractors had been accomplished, the extent of training and the "granular details" of training requirements, how the work was being performed and its planned duration, and whether unit employees would be endangered through contractor safety problems. (8 ALJD 5-10; 15 ALJD 7-9; TR. 58-59, 61, 286-289, 337-338).

The record establishes that the requests contained in paragraphs 1, 5 and 6 of GC Exh. 28, would enable the Union to formulate proposals related to safety, which remained a paramount concern to the Union. The record reflects a history of genuine safety concerns by the Union related to subcontracting in a potentially dangerous industry on both the electric and gas operations side (dealing with high-voltage, high pressure flammable gases). (See also 8 ALJD 11-14; 20 ALJD 15-20; Tr. 61, 85, 289-290, 328-331, 334-336, 337-338, 576-580, 586, 658-660, 662-663, 665-667, 803-806, 925-930; GC Exh. 29, 29(a); GC Exh. 73-77, 115, 118).

The ALJ appropriately rejected Respondent's claims that the August 29, 2011 letter sought information as to the Employer's decision to subcontract, rather than the effects of subcontracting. (14 ALJD 30-32; R Exc. 8). The ALJ noted that the August 29 letter on its face clearly referred to seeking information for the purpose of "effects bargaining." (14 ALJD 31-32). Respondent's exception, R Exc. 8, objects to the ALJ's finding that the Union needed to know the contractual price (requested in paragraph one) in order to make proposals to persuade the Employer to increase overtime for unit employees, in lieu of subcontracting the work. Respondent in its BSE, pp. 32-33, 40 n.12, and R Exc. 8, excepts on the basis that any requests related to whether unit employees could perform work on overtime were related to the "decision," rather than the "effects" of subcontracting.

However, the ALJ properly found that the requested information was necessary to formulate effects bargaining proposals to persuade the Employer to offer additional overtime to the unit; to propose unit employees receive a portion of any savings that resulted from subcontracting; or to propose an increase in unit employees' wages if subcontractors cost more than unit work. (15 ALJD 1-9, 17-23). Likewise, the Union could have proposed contract language providing for a minimum of overtime hours or guaranteed hours of work for unit

employees on a particular job. Specifically, the requested information would have permitted the Union to compare costs of anticipated savings by subcontracting, and based upon that data, formulate proposals to ameliorate any lost overtime opportunities.

In addition, lost overtime opportunities are genuine effects bargaining topics, over which the Union was entitled to negotiate. The ALJ accurately found, based upon employee witness testimony, that qualified employees were available, and would have taken advantage of these real lost overtime opportunities.<sup>8</sup> (15 ALJD 1-9, 17-23; 19 ALJD 47-49; Tr. 395-399, 407-410, 412-413, 418-419, 424; 512-514, 591; GC Exh. 25). See Dorsey Trailers, Inc., 321 NLRB 616, 618 (1996) (the potential loss of overtime opportunities is sufficient adverse effect on employees). If timely effects bargaining had occurred, the Union might have secured benefits to compensate for lost overtime opportunities, at a time when some measure of balanced bargaining power remained. (Tr. 69, 328-329). See Live Oak Skilled Care, 300 NLRB 1040, 1042 (1990). Thus, contrary to Respondent's argument, requested information that could be used to formulate proposals related to lost overtime opportunities, constituted relevant effects bargaining topics.

Furthermore, Respondent in its BSE, pp. 27-28, and 33, inaccurately claims there was no relationship between the diminution of the unit and subcontracting; and that the ALJ did not clarify how the information request, GC Exh. 28, related to effects bargaining concerning the size of the unit. The ALJ appropriately found that the Union requested information to ascertain the impact of subcontracting upon the number and working hours of unit employees. (7 ALJD

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<sup>8</sup> See 19 ALJD 51-52; 20 ALJD 1-5, which cites Hospital San Cristobal, 358 NLRB No. 89, slip op. at 11, n. 26 (2012) (a union's interest in subcontracting decisions is not limited to circumstances where unit employees are laid off; work identified for subcontracting provides bargaining unit members with the opportunity to obtain extra shifts (possibly at higher wage rates that the employer might pay for overtime or for working undesirable hours), or expand or maintain the size of the bargaining unit with newly hired employees.).

47-48). The ALJ found that requested information (i.e., such as the details of the subcontracts) was necessary to compare with staffing levels of unit employees. Respondent has prohibited hiring into the electric and gas services department over many years, and a failed to replace 15 retired employees in the electric operations, and at least 10 employees in the gas operations, over the last five years. The ALJ correctly noted that while Respondent curtailed hiring, it also simultaneously increased its reliance upon subcontractors.<sup>9</sup> (7 ALJD 49-51; 19 ALJD 20-34; Tr. 68-69, 71, 189-191, 331, 338, 492, 593-594).

The record reflects the Union's legitimate concerns about the diminution of the unit, accompanied by Respondent's increased reliance upon contractors. (Tr. 338, 671-672, 705-710, 715, 923-924). The record testimony establishes that Respondent increasingly relied upon subcontracting, especially since 2009 and 2010, see: Tr. 702, 750, 755, 979, 1135; CP Exh. 7 ("Supplemental Testimony of Capital Expenditures, Reliability and Operation Panel," New York State Public Service Commission (NYSPSC), p. 5, lines 6-15 [Michael Eastman, Vice President, Gas Operations: Respondent's use of outside contractors will increase and expand]; See also Jt. Exh. 1 [showing increased levels of subcontracting from 2010 to 2011 for named subcontractors in amended consolidated complaint]).

Notwithstanding Respondent's claims, the subcontracts at issue, GC Exh. 15-21, threatened the very existence of the unit. (GC Exh. 15-21, 48-51). A recent audit presented to the NYSPSC criticized Respondent for scaling back its full-time workforce, while enhancing its reliance on contractors to accomplish many tasks. (See GC Exh. 45(b), Volume I, filed June 4,

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<sup>9</sup> Rick Irish testified that from 2003 through November 2011, there was no hiring related to the gas and electric field operations of Respondent, and that the unit shrank from a peak of over 420 in 2005 to around 340, when he left in November 2011. Union business manager Jeffrey Sondervan also testified about instances where Respondent took employees and transferred them out of the unit classifications, leaving the classifications vacant at the same time that it subcontracted work. Union officials Craig Rode and Jeffrey Hagadorn also testified about lack of hiring into their respective departments. (Tr. 68-69, 71, 189-190, 338, 492, 593-594).

2012, Final Report Management Audit, (public and redacted version: 8/27/12), pp.13, 14, 23; II-13-14; XI-81; XII-7; XIII-57; App. A-19, A-21, A-25, A-26; and certification sheet).

The Union asserts that the requested information (i.e., in paragraph 1) would have enabled it to advance proposals to address the long-term stability of the bargaining unit, thereby counteracting the perceived diminution of the unit in favor of subcontractors. For example, the Union could have proposed staffing increases or modifications to staffing hours to ameliorate the effects of subcontracting. Additionally, the Union could have proposed alternative staffing arrangements, such as hiring temporary employees or transferring employees to perform certain work. (Tr. 69, 328-329; 332, 335; GC Exh. 45(a)-(d)). In short, the ALJ correctly concluded that requested information in GC Exh. 28 related to discrete topics of effects bargaining. (15 ALJD 1-9, 17-23; 19 ALJD 47-49).

The ALJ appropriately concluded that Respondent unlawfully and unreasonably delayed in providing the necessary information for effects bargaining until March 20, 2012. (16 ALJD 20-26; 17 ALJD 6-8; R Exc. 2, 8, 13, 17). Woodland Clinic, 331 NLRB 735, 737 (2000). On March 20, 2012, Respondent provided the Union with March 19 letters with attached information, including master service agreements and/or contracts, responsive to the August 29, 2011 information request regarding the seven named subcontractors then currently performing unit work in 2012. (GC Exh. 15-21; Tr. 21-22, 38, 312-327; 11 ALJD 16-30; 12 ALJD 27-29; 13 ALJD 28-29; 15 ALJD 45-47). Moreover, the record establishes that Respondent failed to provide the Union with the O'Connell contracts/amendments from November 4, 2011 through March 15, 2012, (which were clearly encompassed by the August 29, 2011 information request), until Respondent provided them pursuant to subpoena at hearing. (GC Exh. 48-51; Tr. 215-216;

316; 1101-1102). This further evinces Respondent's complete disregard for its bargaining obligation to provide information that is necessary and relevant for effects bargaining.

2. The ALJ correctly rejected Respondent's defenses to its alleged unreasonable delay in providing information. (R Exc. 29-33).

The ALJ correctly rejected Respondent's defense to its failure to timely provide the information. (16 ALJD 28-30; R Exc. 29). In R Exc. 29, and its BSE, pp. 34-38, Respondent contends that the ALJ improperly dismissed its defense that providing the information was burdensome, and that the Union failed to bargain with Respondent over its defenses. On the contrary, the ALJ properly concluded that in spite of Respondent's claims on February 1, that to provide the information was a "burdensome" process, the information was easily and readily obtainable by Respondent's managers Rich Frank and Edward Pozzuolo. The record reflects that managers, such as Frank and Pozzuolo readily had access to information about the seven subcontractors performing work in their respective departments. (16 ALJD 28-36; R Exc. 29, 30; Tr. 606-607, 609, 647, 817, 835, 858-859, 863; GC Exh. 60-62; GC Exh. 89; R Exc. 30).<sup>10</sup> As noted by the ALJ, Respondent's internal e-mail reveals that it easily ascertained the requested information starting in February 2012, (including February 16, 17 and 22, 2012 internal e-mails),

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<sup>10</sup> Contrary to R Exc. 29 and 30 (which contends the information was not easily obtainable from the computer system), the record establishes that Respondent could have easily obtained responsive information. See 16 ALJD 38-45. Richard Frank testified that he received reports regarding the number of subcontractors on site, and that supervisors received reports regarding their locations. The record establishes that by way of example, Respondent regularly received subcontractors' detailed logs of proposals, (ie., GC Exh. 60), daily crew complement sheets (ie., GC Exh. 61), invoices (GC Exh. 61), and work order logs. Combined with the detailed spreadsheets developed by Respondent's management (ie., GC Exh. 89), Respondent clearly possessed the information to readily respond to the Union's information request. Ed Pozzuolo also testified that he could access information about subcontracting from Respondent's SAP computer system and received periodic reports regarding progress of subcontracting. (Tr. 609, 817, 835, 858-859, 863; GC Exh. 60, 61, 89).

inexplicably still taking until March 20 to finalize the response.<sup>11</sup> (16 ALJD 38-45; Tr. 644; GC Exh. 86, 88, 89 [draft spreadsheet]).

Moreover, the Union during the February 1 meeting, pledged to safeguard any confidentiality concerns. (Tr. 357-358; GC Exh. 10 [February 6, 2012 letter]). As the ALJ found, the Union, in its February 22 letter, was willing to modify its requests to address any concerns that the request was too burdensome, asked Respondent to elaborate upon the specific concerns, and once again pledged to safeguard any confidentiality concerns. (GC Exh. 12; 16 ALJD 47-49). Respondent, however, failed to provide any further elaboration regarding specific requests it considered burdensome or that potentially could implicate confidentiality concerns. Respondent blames the Union for not doing enough to address its confidentiality or burdensomeness concerns, as an excuse for its own unreasonable delay. However, solely asserting vague confidentiality or burdensomeness concerns, without anything else, as Respondent did here, is not sufficient. (Tr. 297, 561). It is Respondent's burden to seek an accommodation addressing specific confidentiality or burdensomeness concerns.<sup>12</sup> Here, Respondent failed to provide detailed assertions as to what was confidential or burdensome, and further failed to seek any kind of accommodation with the Union. In fact, it was the Union, during the February 1, 2012 meeting, and February 22 letter, GC Exh. 12, that offered to work

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<sup>11</sup> The ALJD inadvertently states that the February 22, 2012 e-mail, GC Exh.89, was sent by Respondent's Lead Advisor, Labor Relations, Thomas Cammuso to Union official Rick Irish. However it was, in fact an internal e-mail with a draft summary and spreadsheet, from Cammuso to Rich Frank, Manager, electric operations, based upon responses regarding existing subcontractors who were contracted to do unit work. GC Exh. 89 was never provided to the Union at any time. (10 ALJD 34-35). The first time Respondent provided detailed information about the seven subcontractors named in the Amended Consolidated Complaint to the Union was through the March 20, 2012 responses. (Tr. 312-315; GC Exh. 15-21).

<sup>12</sup> See Taylor Hospital, 317 NLRB 991, 993 (1995), *citing* Pennsylvania Power Co., 301 NLRB 1104 (1991) (an employer refusing to supply information on confidentiality grounds has a duty to seek an accommodation between the union's information needs and the employer's justified interests.). Likewise, the onus is on the employer to show that production of data would be unduly burdensome, and to offer to cooperate with the union in reaching a mutually acceptable accommodation. See Mission Foods, 345 NLRB 788, 789 (2005).

with Respondent regarding any of Respondent's concerns. (Tr. 304, 357-358; 10 ALJD 24-32; 16 ALJD 47-49). Respondent failed to demonstrate the information was difficult to retrieve, overly complex or extensive, to account for any delay. Allegheny Power, 339 NLRB 585, 587 (2003).

The ALJ appropriately rejected Respondent's contention that Respondent mistakenly believed the August 29 letter referred only to the Heath subcontracting; or that the Union's own conduct somehow communicated that Respondent did not have to supply information for all subcontractors. (13 ALJD 23-30; R Exc. 32, BSE, pp. 34-38). Likewise, it is incredulous for Respondent to argue, as it does in its brief, BSE, pp. 18-19, 34-38, and R Exc. 32, that Director of Labor Relations Shapiro in February 2012 was genuinely surprised that the Union wanted information about all subcontractors.

In fact, the record reflects that at no time did the Union local officials ever limit the applicability of the August 29, 2011 information request, or indicate they no longer sought to bargain about each and every instance of subcontracting. (Tr. 64). Furthermore, the record established that Respondent was immediately aware that the broad August 29, 2011 request covered all subcontracting. As the ALJ appropriately found, Shapiro testified, he knew "at the start" it applied to other contractors besides Heath, from the face of the request. (Tr. 1087-1089, 1110-1112; GC Exh. 120, 141; R Exc. 32; 8 ALJD 44-46; 13 ALJD 32-35; R Exc. 32). GC Exh. 28 on its face clearly seeks information *for each and every subcontractor*; likewise the August 26 e-mail described the information request as applying to "this and all other subcontracting." (GC Exh. 28; 13 ALJD 29-30). Shapiro further testified that the Heath subcontracting was the "issue at the time" in the context of Respondent responding to the August 29, 2011 information request. (Tr. 1112). Even if Shapiro purposely only focused on Heath in responding, that does

not relieve Respondent of its statutory bargaining obligation to timely respond to an unambiguous request for all subcontractors. Shapiro conceded that he and Lead Advisor, Labor Relations, Thomas Cammuso somehow inexplicably decided to provide information only concerning Heath, without providing information on other subcontractors. (Tr. 1110-1111).

Additionally, the Union's conduct in continually protesting and seeking information for other subcontracting besides just Heath Consultants - such as the Fillmore subcontracting, and the Station 42 project, demonstrates that the Union consistently considered the August 29 information request to apply to all subcontractors.<sup>13</sup> (Tr. 301-303; 1090-1092; GC Exh. 1(a); GC Exh. 9; GC Exh. 11). Respondent's own internal February 16, 2012 e-mail even acknowledges, in GC Exh. 88, that it was "legally obligated" to provide the information upon request.

Respondent in R Exc. 33, and BSE, pp. 35-36, further points to International IBEW Representative Jim Schlosser's error in stating the Union's position as an excuse for a further delay. The ALJ properly rejected this claim, enunciated in R Exc. 33, that Schlosser's comments relieved Respondent of its bargaining obligation to timely provide information necessary for effects bargaining. (16 ALJD 51-52; 17 ALJD 1-4; R Exc. 33). The February 1, 2012 statements by Schlosser were promptly "repudiated" in writing by Union business manager Sondervan in a February 6, 2012 letter, GC Exh. 10, leaving no doubt as to the Union's

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<sup>13</sup> Contrary to Respondent's discussion of events in BSE, p. 18, 34, the issue of all subcontractors, and the related applicability of the August 29, 2011 information request, remained an ongoing concern for the Union in the Fall 2011. The record reflects that Fall 2011 served as a period of transition for the Union's leadership: Richard Irish who had served as the Union's president/business manager since November 2003, on November 26, 2011, was replaced by Jeffrey Sondervan. (Tr. 43, 44, 67, 383). In November and December 2011, Sondervan received phone calls from stewards indicating that the volume of subcontracting had been increasing and that as a result unit employees were worried about their future. (Tr. 285). On November 14, 2011, the Union requested information about Respondent's use of subcontractor D&D, and protested Respondent's use of subcontractor D&D to perform emergency restoration work during a Fillmore storm incident; which originally was part of the charge in 03-CA-075635. (Tr. 1090-1092; GC Exh. 1(a); GC Exh. 9). Likewise, when informed on January 31, 2012, of Respondent's subcontracting at a Station 42 project, on February 2, 2012, the Union demanded an opportunity to bargain over the effects of such subcontracting to "any and all subcontractors," and requested a response to the attached August 29, 2011 information request. (GC Exh. 11; Tr. 301-303).

continued need for the information as it applied to all subcontractors. (GC Exh. 10; Tr. 300-301, 358-360; 17 ALJD 1-4). It is undisputed that earlier in the February 1, 2012 full meeting, the Union expressed the need for information for all subcontractors to formulate effects bargaining proposals. (Tr. 298-300, 562, 1092, 1094; 17 ALJD 1-4). After the Schlosser comments, the Union continued to consistently assert the need for information as it applied to all contractors: through its February 22 correspondence, February 23 meeting, and March 6, 2012 letter. (Tr. 308-9, 311-312, 365, 522-23, 550, 564-566; GC Exh. 12, 14; 17 ALJD 1-4).

In conclusion, Respondent failed to demonstrate any legitimate reason why it delayed for approximately 7 months in providing the responsive information.<sup>14</sup> Respondent violated Section 8(a)(1) and (5) of the Act by unreasonably and unlawfully delaying for nearly seven months in providing relevant information for effects bargaining. (16 ALJD 20-26; 17 ALJD 6-8; R Exc. 2, 8, 10, 11, 13, 17, 18, 29-33). E.I. DuPont de NeMours & Co., 346 NLRB 553, 577 (2006); Good Life Beverage Co., 312 NLRB 1060, 1062 n. 9 (1993).

**C. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) and (5) OF THE ACT WHEN IT FAILED TO GIVE TIMELY NOTICE AND FAILED TO AFFORD THE UNION AN OPPORTUNITY TO BARGAIN ABOUT THE EFFECTS OF SUBCONTRACTING FOR SEVEN SUBCONTRACTORS. (19 ALJD 5-24 ALJD 20; 24 ALJD 42-44; R Exc. 1, 3-7, 9, 12-16, 18- 21, 25-28, 34-36, 38).**

The ALJ properly concluded that Respondent violated Section 8(a)(1) and (5) of the Act

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<sup>14</sup> On August 29, 2011, Respondent's Director of Labor Relations Jay Shapiro forwarded the Union's August 29, 2011 request to bargain to other labor relations managers: Thomas Cammuso, Respondent's Lead Advisor, Labor Relations, and Sheri Lamoureux, Vice-President of Human Resources, as well as counsel. (Tr. 1060, 1087-1089, 1110-1111; GC Exh. 120; GC Exh. 141). Respondent's contends in R Exc. 31 that natural storm disasters prevented its prompt response to the information request as to the seven subcontractors it supplied information for on March 20, 2012; however, it is apparent that the storms at issue were over by September 2011. The argument that the state of emergency created an initial delay, seems to be counteracted by Shapiro's testimony that the Employer purposely decided not to provide all subcontractors to the Union, in spite of the request's plain language. (Tr. 1110-1112). See discussion *supra*, at pp. 7-10 for how Respondent claims the storms impacted response in providing Heath subcontracting information. Nonetheless, it is established that an employer cannot justify delays in supplying information on the basis of other, unrelated, demands on its time. Comar, Inc., 349 NLRB 342, 354 (2007).

by failing and refusing to give timely notice to the Union, and by failing to afford the Union an opportunity to bargain over the effects of its decision to subcontract to the seven contractors. (4 ALJD 11-14; 17 ALJD 22-23, 33-35; 19 ALJD 5-9; 24 ALJD 17-20, 42-44; 20 ALJD 20-317; R Exc. 1, 3, 4, 12, 15, 16, 26).

1. The ALJ correctly concluded that Respondent violated its obligation to bargain over the effects of each specific instance of subcontracting. (R Exc. 1, 3, 4, 12, 15, 16, 18, 26).

As previously discussed, the ALJ correctly concluded that effects bargaining must be conducted in a meaningful manner and at a meaningful time. (17 ALJD 25-28). First National Maintenance Corp., 452 U.S. 666, 681-682 (1981). The ALJ also properly concluded that pre-implementation notice is required for meaningful effects bargaining. (17 ALJD 40-45; 18 ALJD 1-10; R Exc. 12, 15, 16); Los Angeles Soap Co., 300 NLRB 289, 295 n.1 (1990). As discussed, proper notification requires that effects bargaining must occur sufficiently before actual implementation of the decision so that the union is not presented with a *fait accompli*. (18 ALJD 6-9; R Exc. 12, 15, 16). Woodland Clinic, 331 NLRB 735 (2000). See Section II-A-1, *supra*.

Contrary to Respondent's exceptions 1, 3, 4, 12, 15, 16, and 26, the ALJ properly concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing to give proper pre-implementation notice and opportunity to bargain over effects to the Union, prior to entering into each particular subcontract and implementing projects pursuant to those agreements. (GC Exh. 1(o), para. VII (a); 17 ALJD 33-35; 19 ALJD 5-9; R Exc. 1, 3, 4, 12, 15, 16, 26). (17 ALJD 40-45; 18 ALJD 1-4; 20 ALJD 20-24; 20 ALJD 28-31; 21 ALJD 46-49; 23 ALJD 7-11, 25-30,

38-45). Allison Corp., 330 NLRB 1363, 1366 (2000);<sup>15</sup> Public Service Co. of Colorado, 312 NLRB 459, 460 (1993).

In Public Service Co. of Colorado, *supra*, at 460, the Board found that although an employer's decision to subcontract did not violate the specific contractual provision (prohibiting subcontracting where the specific purpose was to lay off unit employees), the employer still unlawfully failed to provide the Union with adequate notice and an opportunity to bargain over specific instances of subcontracting. The Board held in Public Service Co. of Colorado, 312 NLRB 459, 460 (1993), that although it had previously bargained about subcontracting, the employer still maintained its duty to bargain about a particular project. Although that case deals with the employer's obligation to bargain about both the decision and effects, the principles still apply to the effects bargaining obligation – over each instance of subcontracting. Hence, the ALJ agreed that a bargaining obligation attached for each subcontract and project. (20 ALJD 20-24; 20 ALJD 28-31; 21 ALJD 46-49; 23 ALJD 7-11, 25-30, 38-45).

The ALJ appropriately concluded that although the Union promptly requested effects bargaining over Respondent's subcontracting, bargaining never occurred in a "meaningful manner." (17 ALJD 33-35). The ALJ found that the seven month delay in notifying the Union that it entered into subcontracting projects/master service agreements, and in providing relevant requested information, deprived the Union of notice and an opportunity to engage in meaningful bargaining at a meaningful time, pre-implementation. (19 ALJD 5-9; GC Exh. 15-21; See also

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<sup>15</sup> In Allison Corp., 330 NLRB 1363, 1365-1366 (2000), the Board held that although a contractual provision served as a waiver of the union's right to bargain about the decision of subcontracting, nonetheless the employer was still obligated to bargain about the effects of its subcontracting. The Board held that once the employer made the decision to subcontract (which also involved lay-offs) the time was "ripe" for effects bargaining, and the employer had a duty to provide pre-implementation notice to the union to permit "meaningful effects bargaining." Allison Corp., *supra*, at 1366. The Board found that the employer violated Section 8(a)(1) and (5) of the Act by failing to provide the union with prior notice and an opportunity to engage in meaningful negotiations regarding the effects of its lawful decision to subcontract unit work. (17 ALJD 40-45; 18 ALJD 1-4).

23 ALJD 40-46; R Exc. 13). Allison Corp, 330 NLRB 1363, 1366 (2000). Miami Rivet of Puerto Rico, Inc., 318 NLRB 769, 772 (1995).

The ALJ appropriately found throughout the decision, that Union business manager Sondervan credibly testified that the Union was not aware of the specific contracts, GC Exh. 15-21, before he received them on March 20, 2012. (Tr. 312-315; 12 ALJD 27-29; 13 ALJD 28-29; 15 ALJD 45-47; 19 ALJD 11-13; R Exc. 15, 26). In the cover letters, Respondent informed the Union that it had already engaged in or implemented the subcontracting as of 2012 before it gave notice to the Union. (GC Exh. 15-21; Tr. 312-315; 1076, 1093; R Exc. 18; 20 ALJD 20-31). Respondent admitted through its correspondence, (its cover letters in GC Exh. 15-21) and Vice-President, Human Resources, Sheri Lamoureux's acknowledgement at the February 23, 2012 executive session, that it was obligated to bargain about the effects of subcontracting. (Tr. 311, 523; see GC Exh. 15-21 [letters stating "we... stand ready to answer questions and engage in effects bargaining"]; R Exc. 28).

Nonetheless, even in the face of the Union's August 29, 2011 request to bargain, Respondent still failed to provide pre-implementation notice that would have afforded meaningful bargaining. After August 29, 2011, Respondent blatantly continued to enter into subcontracts (GC Exh. 16, 17, 19, 20, 21, 48-51) and associated subcontracted projects for 2011 and 2012. Respondent also continued to subcontract projects in 2011 and 2012 pursuant to two master service agreements, GC Exh. 15, 18, which predated the August 29, 2011 information request.<sup>16</sup> (20 ALJD 20-31); Public Service Co. of Colorado, *supra*, at 460. It is undisputed that

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<sup>16</sup> See Tr. 69-70, 316-321, 324-327, 391, 405, 415, 490, 614, 616-620, 623-628, 632, 635-639, 642-645, 685-688, 691--694, 696,697- 699, 700, 850, 852, 865-866, 875-878, 981-982, 984, 990, 1006; see also exhibits: GC Exh. 15-21; GC Exh. 48-51; GC Exh. 53, 55-57; GC Exh. 58, 60, 61, 62, 63 64(a), 64(b); GC Exh. 65, 65(a); GC Exh. 66; GC Exh. 67-70; GC Exh. 71, 72; GC Exh. 82, 85; GC Exh. 107; GC Exh. 111, 111(b), 111(c); GC Exh. 112. See also GC Exh. 88, and 89, internal Respondent e-mails from February 2012, for a summary discussion and chart of the work performed by the named subcontractors in 2012.

the work described in the March 19 cover letters and attached contracts in GC Exh. 15-21, and the projects actually performed pursuant to those contracts constituted unit work.<sup>17</sup> Furthermore, the named subcontractors performed subcontracting projects consisting of unit work, for which the employees were qualified, and which was more than *de minimis* in nature. (R Exc. 21).<sup>18</sup> The ALJ soundly concluded that had the Union been timely and properly notified of plans to subcontract and the existence of the subcontracts prior to their implementation, the Union could have engaged in meaningful effects bargaining concerning the impact on unit employees. (8 ALJD 5-10; 15 ALJD 1-9, 17-23; 19 ALJD 40-44, 47-49; Tr. 58-59, 61, 69, 286-289, 328-329; 332, 337-338; GC Exh. 45(a)-(d)).

Contrary to Respondent's exception 19, the ALJ correctly found that the subcontracting of unit work caused material, substantial and significant changes to unit working conditions. (19 ALJD 15-38; R Exc. 19). The Bohemian Club, 351 NLRB 1065, 1066 (2007). As discussed *supra*, at pp. 19-21, in this Answering Brief, the record establishes that the Union had legitimate concerns regarding the impact of subcontracting upon the stability of the unit. (7 ALJD 49-51; 19 ALJD 15-38; Tr. 68-69, 71, 189-191, 331, 338, 492, 593-594, 671-672, 705-710, 715, 923-

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<sup>17</sup> Respondent has not denied that any of the work covered by its letters and contracts in GC Exh. 15-21 constitutes unit work. The context of the information request and the response letters, especially the discussion of Article 15, and acknowledgement that various unit classifications could perform the work at issue supports that Respondent was discussing the subcontracting of unit work. (GC Exh. 15-21). See also notes 16 and 18.

<sup>18</sup> The record reflects the following documents, which show subcontracts and associated projects for each subcontractor. The following also reflects the type of unit work subcontracted and some of the unit employee classifications that could have performed the work: 1) Stanley Wright – [underground and pulling cable – cable splicers]: (Tr. 69, 317, 405, 699; GC Exh. 15, 71, 72); 2) Northline Utilities – [line construction work – line mechanics]: (Tr. 635, 685-688, 691, 693, 700; GC Exh. 16, 58, 60, 61, 62, 63 64(a), 64(b)); 3) Premier Utilities – [stakeout work – underground utility inspectors]: (Tr. 321, 391, 490, 850, 852, 875-878, 1006; GC Exh. 17, 111, 111(b), 111(c); GC Exh. 112); 4) O'Connell Electric – [line construction work – line mechanic] (Tr. 614, 616-620, 623-628, 632; GC Exh. 18, 48-51, 53, 55-57). 5) Michels Power – [line construction work – line mechanic]: GC Exh. 19 (contract); March 2012 crew sheet documents (GC Exh. 66), and various agreements (GC Exh. 84 [December 22, 2011 contract]; GC Exh. 107 [June 2012 agreement]; GC Exh. 85 (RFP and associated master service agreement, GC 19); (Tr. 636-637, 639, 696; GC Exh. 19, 66, 82, 85, 107); 6) Power & Construction – [line trouble work, in addition to operations and maintenance work – line mechanics]: (Tr. 642, 644, 981-982, 984, 990, 1006; GC Exh. 20; 67, 68, 69, 70); 7) D&D – [line construction work – line mechanics]: (Tr. 645, 693-694; GC Exh. 21; 65, 65(a)).

924; GC Exh. 45(b), [pp.13, 14, 23; II-13; XI-8; XII-7; XIII-57; App. A-19, A-21, A-26]). Furthermore, as discussed *supra*, at pp. 17-21 of this Answering Brief, subcontracting led to lost overtime opportunities, the need to control safety impact upon the unit through safety training, and the further erosion of the stability of the unit. (7 ALJD 49-51; 19 ALJD 15-38; 19 ALJD 46-49; 20 ALJD 15-17). Each new subcontract consisted of new material terms, and consequently newly impacted the terms and conditions of employment of unit employees, by potentially impacting lost overtime, safety concerns, and hastening the diminution of the unit. (Compare GC Exh. 18, August 2010 O’Connell contract with GC Exh. 48-51).

2. The ALJ appropriately concluded that Respondent failed to demonstrate that the Union clearly and unmistakably waived its right to effects bargaining. (R Exc. 3, 5-7, 9, 13-15, 19-21, 25-28, 34-36, 38).

The ALJ properly rejected Respondent’s defense that the Union waived its right to engage in effects bargaining over the subcontracts at issue. (21 ALJD 5-24 ALJD 20; GC Exh. 15-21; R Exc. 5, 6, 9, 14, 20, 21, 25, 27). The ALJD appropriately analyzed case law for the waiver standard. (20 ALJD 43-48; 21 ALJD 1-3). Under Metropolitan Edison Co. v NLRB, 460 U.S. 693, 708 (1983), a waiver of statutory rights must be “clear and unmistakable.” The courts will “not infer from a general contractual provision that parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’” Metropolitan Edison Co., supra. A waiver will not be lightly inferred. Johnson-Bateman Co., 295 NLRB 180, 183, 188 (1989).

A union may waive its right to bargain in three ways: 1) express provision in the contract; 2) the conduct of the parties (including past practice, bargaining history, action or inaction); or 3) by a combination of the two. Enloe Medical Center, 343 NLRB 470, 475 (2004), *citing* United Technologies Corp., 274 NLRB 504, 507 (1985). To meet the “clear and unmistakable” standard, the contract language must be specific or it must be shown that the matter claimed to

have been waived was fully discussed by the parties; and that the party alleged to have waived its rights “consciously yielded” its interest in this matter. Allison Corp., 330 NLRB 1363, 1365 (2000), *citing* Trojan Yacht, 319 NLRB 741, 742 (1995). (20 ALJD 43-48; 21 ALJD 1-3).

- a. **The ALJ correctly found the Union did not waive its right to bargain over the effects of subcontracting through the express provision of the contract.** (R Exc. 5, 9, 14, 27).

The ALJ, based upon case law and the record, soundly determined that the contract language, including Article 15 (see 3 ALJD 24-36), did not serve as a waiver of the Union’s right to engage in effects bargaining. (21 ALJD 5-30; R Exc. 5, 14). In determining whether or not the union waived its right to bargain by agreeing to certain contractual language, the Board looks to the precise wording of the relevant contractual provisions, and its specificity regarding the waiver. Allison Corp., 330 NLRB 1363, 1366 (2000); KIRO, Inc., 317 NLRB 1325, 1327, 1328 (1995). In Allison Corp., *supra*, at 1364, 1365 n.14, and 1366, the Board found that the management rights clause, while specific enough to permit the decision to subcontract, (stating that the company shall have the exclusive right to subcontract), did not mention any of the effects of subcontracting.

Accordingly, here the ALJ found that the contract was silent as to effects bargaining. (21 ALJD 5-7). The ALJ appropriately rejected Respondent’s argument that if Article 15 waived the right to the decision, (which only states “may subcontract” rather than “shall” subcontract), it also expressed the Union’s waiver of the right to bargain about effects.<sup>19</sup> Allison Corp., *supra*, at

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<sup>19</sup> In its BSE, p. 45-46, combined with R Exc. 5, Respondent appears to argue a “contract coverage” theory: that where the subject is included in the contract, the union already exercised its bargaining right and the question of waiver is irrelevant. As is well-established the Board has rejected the “contract coverage” test. See Rochester Gas & Electric Corp., 355 NLRB No. 86, *supra* slip op. at 1 (2010), *rev. denied, enf. granted, Local Union 36, Intern. Brotherhood of Elec. Workers, AFL-CIO v. NLRB*, 706 F.3d 73 (2d Cir. Jan. 17, 2013). In that case, 03-CA-025915, filed in 2006 against Respondent, the Second Circuit, in 2013 upheld the Board’s 2010 finding that Respondent violated Section 8(a)(1) and (5) by failing to bargain about the effects of removing employees’ practice of taking company vehicles home from work.

1365. (21 ALJD 9-18; R Exc. 5, 6, 14). Moreover, while Article 15 discusses layoffs, it does not explore all possibilities related to effects bargaining topics such as: safety concerns regarding contractors; lost overtime opportunities and related compensation to unit employees; and proposals to deal with diminution of the unit. (21 ALJD 26-30). As such, the contract, as in Allison Corp., *supra*, by its express language does not clearly and unmistakably waive the union's right to bargain concerning the effects of subcontracting.<sup>20</sup>

**b. The ALJ appropriately concluded the Union did not waive its right to effects bargain after examining the parties' bargaining history.** (R Exc. 6, 14, 20, 28).

The ALJ, based upon case law and the record, correctly concluded that the Union did not clearly and unmistakably waive its right to bargain concerning effects through its conduct during collective-bargaining negotiations, or other bargaining activity. (21 ALJD 32-52; 22 ALJD 1-26). Enloe Medical Center, 343 NLRB 470, 475 (2004). First, the ALJ soundly concluded that Respondent's expressed willingness to engage in effects bargaining, as demonstrated by its September 16, 2011 letter (GC Exh. 5), statements during the February 23, 2012 effects bargaining session (GC Exh. 13 –agenda; Tr. 308, 522, 550, 564-565 ), and March 20 letters (see

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<sup>20</sup> Respondent argues in R Exc. 9, and R Exc. 27, that an August 28, 2003 side letter to the contract addressing the proximity of contractors to employees, reflected an express provision regarding safety, and foreclosed further bargaining on the topic. However, Michael Flanagan testified that the purpose and thrust of the provision was to protect union interests, and reflected the common held philosophy followed by other utilities of separating unionized employees from non-union contractors. Other safety issues besides proximity (i.e., such as utilization of common communication skills/signals between contractors and Respondent, training capacity for contractors) are not addressed in the side letter, and thus could have been bargained. (GC Exh. 3(a); Tr. 242, 245, 260). See KGTV, 355 NLRB No. 213 (2010), slip op. at 3-4 (Board found that an employer complied with its decision bargaining obligations related to layoffs, but failed to bargain in response to a request to bargain about effects. In discussing the contractual layoff provision, it held: "To the extent there were effects on the remaining unit employees, such as changes in workload, article 5.4 did not address them, and they would remain subject to bargaining as well."). The ALJ properly noted that past discussions regarding separating unit employees from subcontractors did not foreclose the Union from seeking further negotiations with Respondent on safety matters as requested in the August 29, 2011 letter. (22 ALJD 11-19; R Exc. 9, 27).

GC Exh. 15-21), establishes that it did not believe the Union had clearly and unmistakably waived its right to engage in effects bargaining. (21 ALJD 32-43; R Exc. 28).<sup>21</sup>

Second, the ALJ noted that no waiver could be found, because Respondent effectively presented the Union with a *fait accompli*, by entering into and implementing the subcontracts before notifying the Union about them. (21 ALJD 46-49; R Exc. 12, 14). National Car Rental Systems, Inc., 252 NLRB 159, 163 (1980) (union did not waive its right to effects bargaining where the employer's announcements of closing and terminations as a *fait accompli* precluded request to bargain over effects).

Respondent in its exceptions, R Exc. 6, 14, and its BSE, pp. 41-45, argues that the bargaining history establishes a waiver. The ALJ appropriately rejected Respondent's argument that because the Union during past negotiations, at one point, raised the topic of overtime or safety issues, that it thereafter "clearly and unequivocally" waived its right to bargain. (21 ALJD 51-52; 22 ALJD 1-9). The facts and circumstances of the bargaining history reflect that the parties did not fully discuss and consciously explore a clear and unmistakable waiver of the union's bargaining right related to the effects of the subcontracting. Allison Corp., 330 NLRB 1363, 1365 (2000); Johnson-Bateman Co., 295 NLRB 180, 183 (1989); Enloe Medical Center, 343 NLRB 470, 475 (2004). (20 ALJD 37-41; 21 ALJD 51-52; 22 ALJD 1-9).

The record establishes that in 2003, the parties entered into negotiations for a collective-bargaining agreement, GC Exh. 3(a). Contrary to R Exc. 20, the record supports the ALJ's description of IBEW International Service representative and chief negotiator, Michael

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<sup>21</sup> Respondent contends in R Exc. 28 that its communications also indicate there is "open litigation" over effects bargaining, and that Respondent will fully engage in effects bargaining "without prejudice" to its legal position. (GC Exh. 5, 15-21). If the waiver was so "clear and unmistakable" then it would be an open and shut case, where Respondent would not even have offered to engage in effects bargaining. There is no indication that Respondent qualified its position on effects bargaining on February 23, 2012; rather, Respondent, on that date, admitted its obligation to engage in effects bargaining, and even put the topic of "effects bargaining on subcontracting" on the agenda. (Tr. 311, 523; 11 ALJD 1-3; GC Exh. 13).

Flanagan's testimony regarding the 2003 negotiations. (3 ALJD 38-44). Flanagan testified that during the 2003 negotiations, Respondent's representative Mark Corbett discussed that Respondent would still provide the Union with an opportunity to negotiate the effects over unit work that was being subcontracted. (Tr. 245, 264, 278). Flanagan testified that he understood that the Union could present unlimited effects bargaining topics regarding the subcontracting of particular jobs, such as overtime issues, concerns about upgrading personnel, trading personnel from different departments, hiring temporary employees to backfill or "anything under the sun." (Tr. 246-247, 266, 275; R Exc. 20).

The record establishes that in late April 2008, through 2009, the parties engaged in negotiations for a new contract. (Tr. 193). Union representatives Irish and Flanagan testified that the Union's main concerns in the 2008-2009 negotiations were to reach a full and complete contract, and to replace the pre-existing broad "management rights" clause, [GC Exh. 3(a), Art. 8, p.7], which included exclusive rights relative to subcontracting. As such, the Union sought, through negotiations, to eliminate the 2003 management rights clause language, in an attempt to address the extensive subcontracting. (Tr. 195, 221-223, 249-252, 255-256, 1107, 1145, 1220 GC Exh. 3(a)).

Around December 2008, the Union alternatively proposed new language for Article 15, subcontracting, as part of a comprehensive proposal, in the event the Union was unsuccessful in obtaining its proposal for a new management rights clause. (Tr. 224, 258, 262, 270). The parties did not engage in substantive discussions during the Union's Article 15 proposal. (Tr. 198, 262, 1159, 1214). Respondent responded to the Union's Article 15 proposal, by expressing that it had "no appetite" for it. (Tr. 262).

Contrary to R Exc. 20, the ALJ appropriately credited, Michael Flanagan's testimony, in which he stated that during the 2008 negotiations the Union did not expressly waive its right to bargain about effects. The record reflects that at no time during the 2008-2009 negotiations, or at any time, did the Union express that it was waiving its right to bargain over the effects of subcontracting. (20 ALJD 38-41; Tr. 195, 221-223, 227, 249-252, 262, 1213, 1215, 1220-1221).

The parties eventually agreed to modify the management rights clause, in Article 8, removing the exclusive right to subcontract language. As a result, the Union mistakenly believed it eliminated Respondent's unilateral right to subcontract in the June 1, 2008 through May 31, 2013 contract. (See GC Exh. 3(b), p. 4, para.6; Tr. 224; 262). IBEW International representative Flanagan testified that because it had obtained the "proper" management rights clause, it no longer needed to modify its Article 15 proposal. As such, the language in Article 15, remained the same from the 2003 to the 2008 contract. (GC Exh. 3(a), (b)). The Union's proposal for Article 15, among others, had been withdrawn. (Tr. 100, 198, 223- 226, 262).

Hence, the record reflects that the Union and Respondent held no substantive discussion over its proposal relative to Article 15, subcontracting, in the 2008-2009 negotiations. (Tr. 198, 262, 1159, 1214). The Union proffered that particular Article 15 proposal, only as a safeguard, in the event it did not obtain the elimination of the exclusive right to subcontract language from the management rights clause, Article 8. Thus, contrary to R Exc. 6, 14 and 20, the record establishes that by merely raising some effects bargaining topics, the Union did not clearly and unequivocally waive its right to bargain; in fact, the bargaining history reflects the opposite – the Union's persistent and consistent effort throughout bargaining, since 2003, to restrict Respondent's ability to subcontract, and ensure its effects bargaining rights. (3 ALJD 38-44; 20

ALJD 37-41; 21 ALJD 51-52; 22 ALJD 1-9; Tr. 194-195, 198, 221-225, 245-247, 249-256, 258, 262, 264, 266, 270, 278, 1107, 1145, 1159, 1213-1215, 1220-1221; R Exc. 6, 14 and 20).

- c. **The ALJ appropriately rejected Respondent's arguments that the Union waived the right to effects bargain because of its past conduct, and that the Union had received notice outside of 10(b) of subcontracting.** (R Exc. 3, 7, 13-15, 19, 21, 25, 26, 34-36, 38).

The ALJ, based upon case law and the record evidence, soundly rejected Respondent's defense claiming the Union waived its right to bargain about effects because of the Union's failure to request bargaining when the Employer subcontracted work in the past. By the same token, the ALJ also accurately rejected Respondent's claim that the Union received notice in the past, prior to March 20, 2012, of the same subcontracting at issue. (22 ALJD 21-52; 23 ALJD 1-36). Respondent in R Exc. 3, 7, 14, 15, 25, 26, 34-36, 38 and in its BSE, pp. 4-12, 23-28, 38-41, has renewed and recycled the same arguments, which once again should be thoroughly rejected. In particular, Respondent contends the Union had notice outside 10(b) regarding the subcontractors at issue based upon Respondent's correspondence around November 23, 2010 (R Exc. 19), prior responses to an information request, information submitted in the past regarding Premier, a slew of e-mails submitted through May 2011, and the Union officials' general knowledge about subcontracting on the property.

Respondent contends that it simply engaged in a continuum of subcontracting from prior years, that involved essentially the same rubber stamp contract with each project, and about which the Union knew prior to March 20, 2012. However, the record reflects that each contract contained particular terms regarding wages, scope of work, special conditions, requirements, etc... (GC Exh. 15-21). For example, a comparison of the August 2010 O'Connell contract with the November 14, 2011 O'Connell master service agreement and amendments (11/14/11,

12/1/11, and 3/5/12) reveals there were major differences in the terms of each master service agreement or amendment.<sup>22</sup> (GC Exh. 18, 48-51).

Furthermore, the ALJ correctly concluded that notwithstanding whether former business manager Rick Irish was aware that certain subcontractors had worked for Respondent prior to the dates of the subcontracts entered into in GC Exh. 15-21, and which were finally disclosed on March 20, 2012, the Union was still entitled to engage in effects bargaining with respect to each new subcontract. (22 AJD 38-45; 23 ALJD 7-9). The ALJ correctly found that each purchase order processed in accordance with a master service agreement contained language stating that it shall constitute a separate and distinct contract for particular services, and that terms and conditions may be amended for the particular purchase order. (22 ALJD 40-45; Tr. 611-612; i.e., see GC Exh. 15, Section 1, 3.3; GC Exh. 16, Section 1, 2; GC Exh. 18, Section 2.2(c)). The ALJ appropriately found that separate transactions were completed for each subcontract. (23 ALJD 7). The record established, and as the ALJ found (4 ALJD 16-52; 5 ALJD 1-8), once the parties had entered into a master service agreement, Respondent sent purchase orders for smaller projects to contractors. (Tr. 601-609, 636-638, 653-656; GC Exh. 79-83, 85, 107).

The practice was that the contractor would inform Respondent if it was accepting a purchase order, and Respondent would provide the particular contractor with instructions regarding the date, time, and materials associated with each separate project; with the contractor sending back invoices for the work performed. Both managers, Richard Frank and Edward Pozzuolo testified that they had to separately approve purchase orders, including even

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<sup>22</sup> A comparison of the O'Connell November 14, 2011 contract and later amendments (GC Exh. 48-51) with the August 2010 contract, (GC Exh. 18), provided to the Union on March 20, 2012, reveals various differences: for example, in the overhead services section, descriptions of new services, such as a new underground duty (excavate/backfill trenches), emergency restoration efforts, and substation duties; new pricing terms/wages/standard hourly rates in schedule D; and a new schedule E, Special Conditions section. As such, the record reveals that GC Exh. 48 was a new master service agreement with new requirements, not simply a continuation of a prior agreement.

authorizing specific jobs. (Tr. 480, 604-608, 827, 855; 4 ALJD 42-44). Hence, the record reflects that contractors did not without warning or any further legal arrangement, interminably show up on Respondent's property, pursuant to a perpetually automatically renewed master services agreement. Respondent's arguments that all examples of subcontracting by the named subcontractors, such as in R Exc. 35 (Premier), or in R Exc. 36, (Stanley Wright), are the same as prior examples of subcontracting, is not supported by the record; especially when particular projects performed pursuant to the subcontracts are examined. (See notes 16 and 18, *supra*).

Likewise, in its BSE, pp. 25-28, and R Exc. 19, Respondent, relying upon Westinghouse Electric Corp., 150 NLRB 1574, 1576 (1965), contends that there was no material, substantial and significant change to unit working conditions, because the alleged subcontracting at issue comported with a regular and consistent past practice in terms of kind and degree, and was a normal part of how the employer managed business. As discussed above, the record establishes there was no regular and consistent past practice of subcontracting; but that each subcontract was unique. However, Respondent's subcontracting analysis under Westinghouse, *supra*, is misplaced, inasmuch as that case law analysis is typically utilized to examine whether the employer has a right to the decision to unilaterally subcontract. The validity of Respondent's decision to subcontract is not at issue in the General Counsel's case; rather only the failure to bargain about the effects of subcontracting. (17 ALJD 19-23).<sup>23</sup> Nonetheless, Westinghouse,

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<sup>23</sup> See Sea Mar Community Health Center, 345 NLRB 947, 957 (2005); Hospital Español Auxilio Mutuo de Puerto Rico, Inc., 342 NLRB 458, 468 (2004); See also Pratt Industries, 358 NLRB No. 52, slip op. at 1, n.1 (2012).

*supra*, at 1577, can be distinguished, from the instant cases.<sup>24</sup>

Furthermore, the parties' conduct does not otherwise reveal the union clearly and unmistakably waived its right to bargain about effects, or that it received adequate notice outside 10(b) of the particular subcontracts and subcontracting performed pursuant to those subcontracts (GC Exh. 15-21, 48-51). After the 2009 contract, the record establishes that the Union realized that its strategy to curb the impact of proliferating subcontracting, by eliminating the exclusive "right to subcontract" language from the management rights clause, had failed to effectively stem the tide of subcontracting. (Tr. 189-191, 223-225, 262). At the same time, around 2009, the level of subcontracting precipitously ratcheted up, altering any previous status quo. (3 ALJD 48-51; Tr.189-191, 225-226, 235, 702, 750, 755, 979, 1135; CP Exh. 7; see also Jt. Exh. 1 [showing increased levels of subcontracting from 2010 to 2011 for named subcontractors in complaint]). As also shown, there had been a demonstrable diminution of the unit over time, with Respondent failing to replace retirees and adhering to a policy prohibiting hiring. (7 ALJD 49-51; 19 ALJD 20-34; Tr. 68-69, 71, 189-191, 331, 338, 492, 593-594, 671-672, 705-710, 715, 923-924).

The ALJ properly rejected Respondent's assertion that the Union waived its right to

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<sup>24</sup> In Westinghouse, *supra*, at 1577, the Board outlined five factors for its conclusion that the employer did not violate Section 8(a)(5) through its decision to subcontract:

1)the subcontracting was motivated solely by economic considerations; 2) it comports with the employer's traditional methods of conducting its business operations; 3) it does not vary significantly from prior established practices; 4) it does not have a demonstrable adverse impact on employees in the bargaining unit; and 5) the union had the opportunity to bargain about changes in existing subcontracting practices at general negotiation meetings.

However, Westinghouse, *supra*, at 1577, can be distinguished, from the instant cases. Regarding factor #5, here, the Union was not presented with an opportunity to meaningfully bargain about the effects of subcontracting at a meaningful time. In fact, Respondent presented the Union with a *fait accompli* regarding subcontracting with the seven named subcontractors. (21 ALJD 46-49; R Exc. 12, 14). Regarding factor #4, as discussed *supra*, at pp. 17-21, Respondent's subcontracting had a demonstrable impact upon the unit, through lost overtime opportunities, possibly safety repercussions to the union, and a threat to the long-term stability of the unit. Nonetheless, it has been held in subsequent cases that a detrimental impact on the bargaining unit employees need not be demonstrated in order to find unilateral subcontracting unlawful. Pratt Industries, 358 NLRB No. 52, slip op. at 11 (2012). Overall, an analysis based upon Westinghouse, *supra*, should not apply to whether Respondent failed to bargain about the effects of its subcontracting decisions.

effects bargain due to the history of subcontracting, by finding that the Union demonstrated that it did not waive its right to effects bargaining over subcontracting, by filing prior charges regarding effects bargaining over subcontracting. (23 ALJD 31-36). The record is replete with examples of the Union, from 2009 through 2011, persistently and aggressively protesting Respondent's subcontracting, issuing numerous information requests to enable the Union to bargain, demanding both decisional and effects bargaining over the subcontracting, filing a grievance<sup>25</sup> in January 2011, and filing various NLRB charges.<sup>26</sup> Certainly, the Union did not "sit on its hands" regarding effects bargaining over subcontracting. For example, on July 27, 2010, the Union sent a general request for information regarding numerous contractors to prepare for effects bargaining and to consider proposals for the next contract. (R Exh. 6; see also R Exh. 41 (2/7/11 request for information about subcontracting, a request to engage in timely decisional and effects bargaining). In Case 03-CA-027891 the Union challenged the expansion of subcontracting stakeout work to Premier, requesting effects bargaining.<sup>27</sup> Contrary to

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<sup>25</sup> On October 7, 2010, the Union protested a schedule change in the TM&R department contingent on the use of a contract crew, and requested information about contractors. Thereafter, the Union filed a grievance in January 2011 over a contractor filling vacant positions, and Respondent's failure to post open positions. (Tr. 1177, 1185; GC Exh. 129, 130, 138; R Exh. 28).

<sup>26</sup> The record contains evidence regarding various unfair labor practice charges filed by the Union. See note 19, *supra*, for a discussion of 2006 case, 03-CA-025915. Also, for example, on July 2, 2009, the Union filed a charge, in Case 03-CA-027222, over events in May 2009 involving the subcontracting of unit work. The Region issued a Fourth Amended Consolidated Complaint on August 31, 2009 alleging the unlawful subcontracting of unit work. The parties entered into a memorandum of agreement to settle the case among others on October 13, 2009. (Tr. 211-212; 231-232 GC Exh. 33, 35, 126). Likewise, the Union filed a charge in Case 03-CA-027791 on September 7, 2010, and on January 7, 2011 alleging that since March 9, 2010, Respondent refused to timely provide relevant requested information, and refused to meet and bargain over the assignment of unit work to NYSEG. On June 8, 2011, the parties entered into a settlement agreement approved by an administrative law judge, which included a cease and desist provision in a notice regarding assignment of work. (CP Exh. 2; R Exh. 99).

<sup>27</sup> Respondent expanded the subcontracting of stakeout work to Premier in June 2010. The Union sent requests for information and a request to bargain over the decision and effects from June through October 2010. Among those requests, included the Union's August 2, 2010 letter, GC Exh. 134, where the ALJ recounted that the Union protested Respondent's decision to subcontract stakeout work, and requested to bargain over the decision and "effects." The August 2, 2010 letter reiterated the prior information request regarding stakeout subcontracting, and explained that the Union needed the information for effects bargaining proposals. (4 ALJD 1-10).

Respondent's contention in R Exc. 25 that the prior Premier charge, in 03-CA-027891, did not relate to effects bargaining, the record reflects that the Union filed charges on December 2, 2010 (GC Exh. 31), alleging Respondent's failure to bargain about the subcontracting of stakeout work and the "effects of same," and an amended charge on December 8, 2010 containing the same allegation (GC Exh. 32). After dismissals and appeals, the Union received a denial of a request for reconsideration of the dismissal on June 27, 2011. (The dismissal was based on the determination that Respondent had the right to unilaterally make the decision to subcontract pursuant to Article 15 of extant collective-bargaining agreement.) Thereafter, on July 26, 2011 Respondent entered into an informal settlement agreement in 03-CA-027891 with Region 3. (4 ALJD 1-10; 23 ALJD 31-36; R Exc. 25, 26, 35; Tr. 143, 198-200, 205-207, 237-238, 987, 989, 1004-1005, 1011-1012, 1181; GC Exh. 31, 32, 36, 39, 40, 122, 123, 125, 131, 132, 133, 134, 137, 140; R Exh. 6, 19, 71).

However Respondent's argument in R Exc. 35, that the determination in a prior charge, 03-CA-027891, (a dismissal on different grounds) prohibits the re-litigation of the current allegation as it relates to Premier, should be rejected.<sup>28</sup> Respondent also contends in R Exc. 35, that Union had prior knowledge of the subcontract and waived an opportunity to bargain, based upon the facts of 03-CA-027891. The charge in Case 03-CA-027891 involves facts and circumstances from 2010, whereas the subcontracting at issue here involves a new subcontract entered into between Premier and Respondent on December 5, 2011, with an effective date of January 1, 2012, (GC Exh. 17) over which Respondent failed to notify and failed to bargain

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<sup>28</sup> Respondent's legal argument that a prior dismissal necessitates dismissal of the instant Complaint, as to Premier, is unfounded. The Board has held that the dismissal of a prior charge by a Regional Director, even where the identical conduct is involved, does not constitute adjudication on the merits, and no *res judicata* effect can be given to these actions. Kelly's Private Car Service, 289 NLRB 30, 39 (1988) (Regional Director's prior dismissal of a charge and refusal to issue complaint did not mandate dismissal of a subsequent complaint, even if respondent claimed it was a "regurgitation" of the prior charge.).

about the effects with the Union. There is no evidence that the Union had knowledge of the actual December 5, 2011 subcontract, GC Exh. 17, until March 20, 2014.<sup>29</sup>

It was not until the Union exhausted all of its administrative remedies through the appeals process,<sup>30</sup> that it embarked on a new strategy to protest the proliferation of subcontracting by demanding to bargain about the effects of subcontracting, and requested effects bargaining information, in GC Exh. 28. (Tr. 199-200, 234, 236; GC Exh. 28). Hence, the Union issued its August 29, 2011 letter, GC Exh. 28, which was precipitated by Pozzuolo's August 26 phone call, requesting to bargain over the effects of each and every instance of subcontracting. (Tr. 199-200, 234, 236; GC Exh. 28).

Moreover, this case is distinct from the line of cases which establish waiver by virtue of the same change or practice, especially as to health care, occurring, at the same time, in the same exact manner, at the exact same time of year.<sup>31</sup> Here, divergent types of subcontracting occurred throughout the year, for specific and unique projects, that were authorized independently. As the ALJ held, Respondent was obligated to bargain about the effects of each distinct subcontract. (22 ALJD 23 ALJD 7-9).

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<sup>29</sup> See also Case 03-CA-027954 [pole setting work]. The Union filed a charge, in Case 03-CA-027954, on January 31, 2011 alleging that since August 1, 2010, Respondent failed to bargain in good faith over the subcontracting of pole setting work, which is unit work, and "and its effects on bargaining unit employees" and failed to timely provide information needed to bargain. On March 9 and April 11, 2011, Respondent provided some information related to pole setting in response to a July 27, 2010 information request. On April 28, 2011, the Region dismissed the case, and on August 2, 2011, the Office of the General Counsel denied the Union's appeal from the Regional Director's decision to refuse to issue complaint in the matter. (Tr. 208-209, GC Exh. 34, 119, 124, 135, 136).

<sup>30</sup> For 08-CA-027891, see GC Exh. 122 [2/28/11 dismissal letter]; 125 [May 9, 2011 denial of appeal]; R Exh. 71 [June 27, 2011 denial of reconsideration]; and GC Exh. 140 [July 26, 2011, informal settlement agreement with Respondent regarding failure to provide information]. For case 08-CA-027954 see GC Exh. 119 [August 2, 2011 denial of appeal in 03-CA-027954].

<sup>31</sup> See Courier Journal, 342 NLRB 1093, 1094 (2004) (unilateral change made pursuant to a longstanding practice is essentially a continuation of a status quo.); E.I.DuPont de Nemours, Louisville Works, 355 NLRB No. 176 (2010). However, see FirstEnergy Generation Corp., 358 NLRB No. 96, slip op. at 16-17 (2012) (rejecting employer's defense that cap on retiree healthcare subsidy is longstanding practice that became part of status quo; held changes were disparate; and that it is necessary to show more than a series of waivers by the union over similar subjects). See also Caterpillar, Inc., 355 NLRB No. 91, slip op. at 1-3 (2010).

Even if *arguendo* the union had failed to request bargaining in the past, the ALJ correctly concluded that a union's past practice of permitting unilateral changes or contract modifications does not constitute a waiver of the union's right to bargain over such changes in the future or insist on adherence to the contract. (22 ALJD 28-32; 23 ALJD 3-5). It has been held that "a union's past acquiescence in an employer's unilateral action on a particular subject generally does not, without more, constitute a waiver by that union of any right it may have to bargain about future action by the employer in that matter." Johnson-Bateman Co., 295 NLRB 180, 183, 188 (1989).

The Amended Consolidated Complaint, para. VII(a), alleges that about March 20, 2012, the Union was put on notice that at various times from about August 11, 2010 to about December 5, 2010, Respondent subcontracted bargaining unit work to the following contractors: Stanley Wright, Northline Utilities, Premier Utility Services, O'Connell Electric Company, Michels Power,<sup>32</sup> Power & Construction Group, and D&D Power. (GC Exh. 1(o)). The dates used for the work "subcontracted" at "various times" in the Amended Consolidated Complaint refer to the dates of Respondent's subcontracts disclosed on March 20; with O'Connell Electric's contract, GC Exh. 18, exhibiting the oldest date with an August 11, 2010 contract, and Premier's contract, GC Exh. 17, the most recent date, December 5, 2011. (11 ALJD 29-51; 12 ALJD 1-2, 26-27).

Contrary to R Exc. 7, arguing that the cases are barred by 10(b), the ALJ properly concluded that the charge (03-CA-081230 [seven subcontractors] ) was filed within the Union's

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<sup>32</sup> It should be noted the ALJD contains an inadvertent error regarding the admission of the Michels contract. The record clearly establishes that the contract at issue, dated November 14, 2011, contained in GC Exh. 19, was received into evidence, along with other Michels contracts and documents reflecting subcontracted work. (11 ALJD 44-45; 20 ALJD 50-51 [note 5]; GC Exh. 19 (March 19, 2012 cover letter and November 14, 2011 contract); Tr. 4, 38 (showing admission of GC Exh. 19); see also GC Exh. 84 (Dec. 22, 2011 construction contract); GC Exh. 107 (June 2012 agreement); GC Exh. 66 (work performed in March 2012 by Michels)).

“clear and unequivocal” constructive knowledge on March 20, 2012, of the subcontracts.<sup>33</sup> (23 ALJD 17-23). Art’s Way Vessels, Inc., 355 NLRB 1142, 1147 (2010); Leach Corp., 312 NLRB 990, 991 (1993). General Counsel alleges in Case 03-CA-081230, that on March 20, 2012, upon receiving specific subcontracts (master service agreements) and the attached letters in GC Exh. 15-21, the Union for the first time learned about those particular subcontracts. (Tr. 312-315; 12 ALJD 27-29; 13 ALJD 28-29; 15 ALJD 45-47; 19 ALJD 11-13; R Exc. 7, 15, 26). On March 20, 2012, the Union also learned that subcontracting occurred in 2012 pursuant to those subcontracting agreements. (Tr. 312-315, 1076, 1093; GC Exh. 15-21). The Union filed a charge in Case 03-CA-081230 on May 17, 2012, and amended it on July 20, 2012, within 6 months of the knowledge it acquired on March 20, 2012.

Thus, the ALJ properly rejected Respondent’s contention that because it subcontracted with the named subcontractors in the past, and had provided information to the Union about such subcontracting in the past, that the Union had sufficient notice outside 10(b) regarding the companies engaged in subcontracting with Respondent. (22 ALJD 34-36; 23 ALJD 25-30). Respondent contends in R Exc. 7, 15, 26, that every time it provided information to the Union in 2010 and 2011 about subcontracts (i.e., R Exh. 19), sent e-mails to the Union in 2010-2011, or whenever Union officials observed subcontractors on site, it put the Union on notice of subcontracting, outside 10(b); and that the Union failed to bargain about the effects of

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<sup>33</sup> In 03-CA-075635, the Union filed the charge on March 1, 2012, within 6 months of the alleged subcontracting of the mandated gas walking survey to Heath Consultants starting on September 6, 2011.

subcontracting.<sup>34</sup>

However, the ALJ properly concluded that the fact that the Union was aware of prior subcontracting projects cannot constitute adequate advance notice as to these seven specific subcontracting jobs. The ALJ noted Respondent could not show that the Union was aware, outside 10(b), that Respondent had entered into the seven specific subcontracts. (23 ALJD 25-30; Tr. 312-315; 12 ALJD 27-29; 13 ALJD 28-29; 15 ALJD 45-47). In the context of subcontracting, Section 10(b) is not measured from when Respondent expresses its intention to subcontract, rather it is measured from when Respondent actually implements the subcontracting. Public Service Co. of Colorado, 312 NLRB 459, 461 (1993). See also Johnson-Bateman Co., 295 NLRB 180, 183 (1989) (a union's failure to demand bargaining triggers when a union is "formally and fully" apprised of the employer's decision).

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<sup>34</sup> Respondent adduced evidence, over General Counsel's and Charging Party's objections and motions in opposition, regarding e-mails to the Union, which reflected weekly status updates of union contractors on Respondent's property, from around November 2010 through May 2011, (GC Exh. 121 (Acting GC's Motion to Exclude Evidence); R Exh. 32-40, 44-47, 49-50, 52, 54-55, 57, 60, 63). The e-mails, purportedly received by the Union, did not provide proper notice and opportunity to bargain, and did not constitute advance notice. (22 ALJD 21-26). The record established that Respondent did not offer to bargain over the effects of subcontracting through these exhibits. The e-mails, which predated the August 29, 2011 information request/request to bargain at issue, GC Exh. 28, simply provided information about ongoing and already implemented subcontracting without affording the Union notice and an opportunity to bargain about effects. The ALJ properly found that Respondent's provision of documents, such as R Exh.19, advising the Union of jobs that were already in progress only further "proved the violation," by demonstrating that the data was not provided in a timely manner for pre-implementation effects bargaining. (22 ALJD 21-26). Moreover, the subcontracting covered by the e-mails and attachments contained data outside the relevant time frame; some data regarding subcontractors not even named in the complaint; as well as some data regarding subcontracting performed for NYSEG instead of Respondent (RG&E). The documents refer to subcontracting prior to the effective dates of subcontracts at issue, GC Exh. 15-17, 19-21, 48-51 (Tr. 124, 228-229, 389, 534-536; GC Exh. 15-17, 19-21, 48-51; GC Exh. 71-72). The e-mails and attachments held neither legal relevance nor probative value. In short, the e-mails and documents did not demonstrate that Respondent provided clear and unequivocal notice of the particular subcontracting for the particular subcontracts at issue in the amended consolidated complaint. Leach Corp., 312 NLRB 990, 991 (1993); Public Service Co. of Colorado, 312 NLRB 459, 461 (1993). Moreover, any argument that spreadsheet exhibits, R Exh.153-156, admitted over General Counsel's and Charging Party's motions and objections reflect the Union's knowledge prior to August 2010, of subcontractors on site, should be rejected on the same basis. (See GC Exh. 38 for Acting GC's Motion). (see R Exc. 36, 38). Respondent has presented no evidence that it provided notice and a meaningful opportunity to bargain about each project listed in those exhibits, outside the 10(b) period. These internal spreadsheets, R Exh. 153-156, created as a response to the trial subpoena, do not reflect that the Union was formally and fully apprised by clear and unequivocal notice of the specific contracts, projects, and implementation at issue in the amended consolidated complaint. (GC Exh. 15-21, 48-51; 23 ALJD 25-30). Leach Corp., *supra*.

In its BSE, at pp. 40, 41 and 47, and R Exc. 13, Respondent contends that the Union's failure to engage in effects bargaining when presented with an opportunity to do so, (such as on February 23, 2012), reflected a disingenuous interest in bargaining over effects. The ALJ soundly rejected this argument, finding that the Union was justified in refusing to engage in effects bargaining until Respondent provided it with all of its requested information. (23 ALJD 38-48; R Exc. 13). The Union did not receive the information necessary to engage in effects bargaining regarding the seven named subcontractors until March 20, 2013. Miami Rivet of Puerto Rico, Inc., 318 NLRB 769, 772 (1995) (union not obligated to bargain at a time when relevant information is withheld). Additionally, the ALJ properly found that the Union's repeated requests that Respondent bargain with it about the effects of subcontracting, and repeated requests for information necessary to bargain, (in writing on August 29, 2011, February 6, February 22, and March 6, 2012, and verbally during meetings held on February 1 and 23, 2012), is evidence that the Union did not waive its right to bargain. (10 ALJD 4-9, 24-32; 11 ALJD 12-14; 23 ALJD 50-53; 24 ALJD 1-15; GC Exh. 10-12, 14, 28; Tr. 297-304, 332, 561-562). East Coast Steel, Inc., 317 NLRB 842, 846 (1995) (requests to bargain after receiving notification of layoff is "conclusive evidence" the Union did not waive its right to bargain).

It should be noted that in R Exc. 34, 35, 36, 38, Respondent fails to cite to any provision of the ALJD, in violation of Section 102.46(b)(1)(ii) of the Board's Rules and Regulations, which holds that each exception "(ii) shall identify that part of the administrative law judge's decision to which objection is made." Accordingly, General Counsel submits that those exceptions should be waived from consideration by the Board on that basis. Nonetheless,

General Counsel still addresses these exceptions on the substantive merits.<sup>35</sup>

**D. THE ALJ CORRECTLY CONCLUDED THAT A REMEDY UNDER TRANSMARINE NAVIGATION CORP., 170 NLRB 389 (1968), WAS APPROPRIATE; BUT GENERAL COUNSEL HAS FILED CROSS-EXCEPTIONS OVER THE MODIFICATIONS. (24 ALJD -27 ALJD; R Exc. 39-42).**

The ALJ appropriately concluded that a Transmarine remedy applied in this case. (25 ALJD 8-30) Transmarine Navigation Corp., 170 NLRB 389 (1968), as clarified in Melody Toyota, 325 NLRB 846 (1998). To the extent that R Exc. 39-42, challenges the appropriateness of a Transmarine remedy, those exceptions should be rejected. Piggly Wiggly Midwest LLC, 357 NLRB No. 191, slip op. at 1, 23 and n.22 (2012). However, General Counsel filed cross-exceptions on February 19, 2014, excepting to the ALJ's modification of the standard Transmarine remedy.<sup>36</sup>

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<sup>35</sup> In its exceptions, R Exc. 35 and 36, Respondent contends that each named subcontractor either performed the same work in scope, kind or degree, or the Union had prior knowledge or opportunity to bargain. These arguments have already been addressed. (See Answering Brief, *supra*, at pp. 39, 41-43, 45; R Exc. 35; R Exc. 36). In exceptions 34 and 38, Respondent contends that the subcontractors did not perform unit work during the alleged period in the amended consolidated complaint. (See R Exc. 34, 38 and BSE, p. 27; GC Exh. 1(o)). Regarding R Exc. 34, [Northline] the record establishes that Respondent entered into a subcontract, GC Exh. 16, dated November 14, 2011, with Northline; and that in December 2011, Northline performed pole-replacement work, which is unit work (see GC Exh. 60, Tr. 691), and in 2012 performed unit work pursuant to that subcontract, without bargaining about the effects. (Tr. 70, 317-320, 415, 635, 685-688, 691, 693, 700; GC Exh. 58, GC Exh. 60-63, GC Exh. 64(a), 64(b); R Exc. 34). Likewise, regarding R Exc. 38, [Michels] the record establishes that Respondent entered into a subcontract with Michels, on November 14, 2011, (GC Exh. 19), along with additional general construction agreements thereafter, GC Exh. 84 (December 22, 2011 for Station 42 project), and GC Exh. 107 (June 22, 2012). The record also reflects Michels performed unit work in 2011, and in 2012 pursuant to the subcontract, GC Exh. 19 without bargaining about the effects of the subcontract. (GC Exc. 66 (reflecting March 2012 crew sheet; Tr. 636-637, 639-640, 696; R Exc. 38). Thus, these exceptions should be rejected on the merits as well.

<sup>36</sup> A Transmarine limited backpay remedy is the Board's standard remedy for an employer's failure to bargain over the effects of a non-bargainable decision. Piggly Wiggly, *supra*, slip op. at 23, n. 22, citing AG Communication Systems Corp., 350 NLRB 168, 173 (2007). Although Transmarine involved loss of employment, the Board has applied the standard Transmarine remedy in cases where the employer's refusal to engage in effects bargaining did not result in lost jobs or reduced wages. See Live Oak Skilled Care & Manor, 300 NLRB 1040 (1990) (Transmarine remedy appropriate where timely effects bargaining might have secured additional benefits); See also Sea-Jet Trucking Corporation, 327 NLRB 540, 548-549 (1999), *enfd.* 221 F.3d 196 (D.C. Cir. 2000). Likewise, the ALJ appropriately ordered Respondent to bargain with the Union, on request, about the effects of its decision to subcontract bargaining unit work. (25 ALJD 1-6).

General Counsel filed cross-exceptions on February 19, 2014, excepting to the ALJ's modification of the standard Transmarine remedy when the ALJ a) based the backpay calculation on qualified employees' loss of overtime pay, rather than the employees' normal wages; and b) based the calculation of maximum backpay due each qualified bargaining unit employee, in part, on the value of wages paid to the subcontractors' employees. See General Counsel's cross-exceptions and brief in support filed with the Board on February 19, 2014.

### **III. CONCLUSION**

**WHEREFORE**, for the foregoing reasons, Counsel for the General Counsel respectfully requests that the Board deny Respondent's exceptions to the ALJ's Decision and adopt the findings of fact and conclusions of law reached by the ALJ, with the above-exceptions.

**DATED** at Buffalo, New York this 10<sup>th</sup> day of March, 2014.

Respectfully submitted,

/s/ Aaron B. Sukert

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## STATEMENT OF SERVICE

I hereby certify that on March 10, 2014, copies of Counsel for General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge in Cases 03-CA-075635 and 03-CA-081230 were served by electronic mail upon:

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