STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Gateway	:	
Development Group, Inc. for a Declaratory	:	
Ruling that the CECONY Must Pay for the	:	Case 15-E-_____
Installation of Underground Electric Service	:	
for the VillaBXV Cooperative Project with	:	
Public Parking Garage.	:	

VERIFIED PETITION
FOR A DECLARATORY RULING
AND COMPLAINT

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INTRODUCTION AND STATEMENT OF FACTS

Currently under construction in the Village of Bronxville is a 54-unit residential cooperative apartment complex with a two-story private/public parking garage known as VillaBXV. This public/private project will include approximately 300 parking spaces with two-thirds reserved for Village of Bronxville commuters and shoppers. The balance will be for the use of the residents of VillaBXV.

Site preparation involves the removal, at the developer's expense, of 30,000 tons of contaminated soil following

protocols approved by NYS Department of Environmental Conservation. The site cleanup is estimated to cost between $8 to $10 million, and results in comparable savings to the Village taxpayers who gain much needed additional parking spaces[1]. VillaBXV residents will have direct access to the Metro-North train station and a 28-minute express commute to Grand Central.

The Gateway Development Group, Inc. ("Gateway") working for the developer, Fareri Associates, believes the Consolidated Edison Company of New York, Inc. ("CECONY") is responsible under CECONY's tariff to pay for the underground electric service to VillaBXV. CECONY is of the opinion that the developer should bear the entire cost of the electric service that breaks down as follows:

CECONY	$400,000	(1/2 already paid by Gateway)
Gateway Site Work	$140,000	
Gateway Electrician	$ 55,000	
Gateway Misc.	$ 30,000	
Total Estimate	$625,000[2]	

[1] The prior use of this site was as an open-air parking lot for merchants, shoppers and commuters.

[2] CECONY and Gateway entered into an agreement wherein Gateway would supply certain labor and materials to complete

As is customary this estimate will be trued up when actual final costs are reported.

In order to enable the project to proceed, Gateway and CECONY entered into a Reservation of Rights Agreement that allows either party to seek resolution of the cost dispute using the Public Service Commission's dispute resolution process. Gateway, after unsuccessful discussions with CECONY, is now exercising that right by filing this Petition for a Declaratory Ruling and Complaint.

The Standard for a Declaratory Ruling is Met

> (a) Declaratory rulings may be issued with respect to:
>
> (1) the applicability to any person, property, or state of facts of any rule or statute enforceable by the Commission or the validity of any such rule;
>
> (2) whether any action by the Commission should be taken pursuant to a rule; and
>
> (3) whether a person's compliance with a Federal requirement will be accepted as compliance with a similar State requirement applicable to that person.
>
> (b) A declaratory ruling may also be issued whenever the Commission determines it is warranted by the public interest.

16 NYCRR §8.1.

This is a case that seeks to determine the legality of CECONY's unilateral decision that Gateway is responsible to bear the entire cost of the underground electric service to

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the site work for CECONY's installation of the electric service.

the VillaBXV project. CECONY asserts that it is following its tariff or rule that is enforceable by the Commission. CECONY also asserts that in assigning all electric service costs to Gateway, it is following its custom and practice for other developments.

A declaratory ruling in this case is also in the public interest to redress a misapplication of the CECONY tariff to the facts at hand and the unjust and unreasonable outcome that directly flows therefrom.

Tariff Provisions At Issue

1. Mandatory Undergrounding Required

General Rule Section 5.5.1 of CECONY's tariff is controlling.

> The Company shall install underground any distribution line, service line, and appurtenant facilities which are necessary to furnish permanent electric service as follows:
>
> a. To a residential subdivision in which it is planned to build five or more new residential buildings, if the residential subdivision will require no more than 200 trench feet of facilities per dwelling unit planned within the residential subdivision, subject to the exceptions listed in General Rule 5.5.4.6;
>
> b. To one or more multiple occupancy buildings if the project will require no more than 200 trench feet of facilities per dwelling unit planned within the project, subject to the exceptions listed in General Rule 5.5.4.6;

c. To any building or residential subdivision which a local governmental authority having jurisdiction to do so requires the underground installation of facilities provided that the Company shall not install service lines beyond the property line for non-residential buildings in such instances; and

d. In response to a request for underground facilities by an applicant for service.

(emphasis added.)

Gateway qualifies for mandatory undergrounding under both subparts b and c of General Rule Section 5.5.1, even though only one qualification is necessary. VillaBXV is a multiple occupancy building and does not require more than 54 units x 200 feet/per unit or 10,800 feet of trenching. The trenching required for the underground electric in the Village streets, including the electric service to the residences and street lights is 1,060 feet[3] or approximately only 10% of the maximum specified by the tariff. So it qualifies under subsection "b". In addition, the Village of Bronxville required undergrounding as one of many conditions of approval. So VillaBXV qualifies under subsection "c".

[3] Trenching along Kensington Road (electrical service) is 595 LF. In addition there are 3 sets of crossings to power the residences @ 45 LF each totaling 135 LF. Total trenching for electrical services are 730 LF. Trenching for light poles totals 330 LF. Trenching for Verizon and Cablevision total 45 LF. Total trenching for electric service and street lights = 1,060 LF. Overall Total Trenching: 1,105 LF.

None of the exceptions found in General Rule 5.5.4.6 apply. That section deals with a situation where

> the new construction of underground distribution lines, service lines or appurtenant facilities within a residential subdivision would be less environmentally desirable than the new construction of overhead facilities, the Company or the applicant may petition the Public Service Commission for a special ruling or for the approval of special conditions which may be mutually agreed upon before construction is commenced, or for granting of an exception, pursuant to 16 NYCRR Part 100.5 (b) and (c).

So it is clear there is no exception to CECONY's obligation to install underground electric facilities.

2. Cost Responsibility Under CECONY's Tariff

Now lets look at the cost responsibility. General Rule Section 5.5.2 of the CECONY tariff states as follows:

> 5.5.2 Company's Cost Responsibility
>
> Where the Company installs underground facilities in accordance with General Rule 5.5.1, the Company shall bear the material and installation costs of construction of its facilities as follows:
>
> * * *
>
> 5.5.2.6 Multiple Occupancy Buildings: Where the Company is required to place facilities underground to serve a residential multiple occupancy building, for any of the reasons listed in "b", "c," or "d" of General Rule 5.5.1, the Company shall bear the material and installation cost for up to a total of 100 feet of underground distribution, supply, and service line times the average number of dwelling units per floor. The total number of floors in the multiple occupancy building shall be used to determine the average number of dwelling units per floor.

Con Ed must supply 100 feet of underground distribution line per dwelling unit served. VillaBXV has 54 units.

Consequently, Con Ed has to supply 5,400 feet of distribution line underground. Yet only 1/5 of CECONY's required contribution is necessary to provide service. This cost responsibility is wholly apart from Village requirements and flows directly from Con Ed's tariff. Notice the language "shall bear the material and installation cost". Nowhere does the tariff say that the developer is obligated to bear these costs. Indeed, this is totally contrary to the public utility compact that requires the utility to provide service and that includes shouldering the costs of that service within the limits prescribed by the tariff.[4] The underground electric service at the heart of this dispute is well within tariff limitations.

CECONY's Argument in Support of its Position that Gateway is Responsible for all Costs is Not Supported by its Tariff or Case Law

CECONY points to Section 5.2.2 of its tariff that requires the applicant to pay for any change in the service location. Section 5.2.2 states:

[4] Indeed, CECONY raises capital (both equity and debt) to invest in its system to earn a return for its investors. Customers pay rates set by the Public Service Commission to support that investment, along with providing for operating and maintenance expenses, taxes and depreciation. Here Con Ed would turn this traditional paradigm on its head requiring the developer to advance the capital and then pay rates as if CECONY had made the investment. The unfairness of this scenario is manifest.

> 5.2.2 Change in Location of Service Line and Appurtenant Facilities
>
> Any change requested in the point of service termination or location of the service line and appurtenant facilities, provided such change is approved by the Company, will be made at the expense of the applicant, who shall pay in advance the Company's estimated cost of such change.

VillaBXV is not requesting a change in service location. This is a new project that is bringing 54 new residential apartment units plus a public/private parking garage in a public/private venture with the Village of Bronxville.

CECONY also cites to the City of New York (Gillen Place), 304 N.Y. 215 (1952) to support its position that Gateway is responsible to bear the cost of this new electric service to VillaBXV. That Court of Appeals decision involved the closing of a NYC street by condemnation to enable the City Department of Transportation to expand its transit storage and repair shop. As a result, both CECONY and Brooklyn Union Gas had to move their electric and gas facilities. The costs of those relocations were submitted as a claim in the condemnation proceeding. The lower court awarded the relocation costs to the utilities as compensation for the taking of their franchise and property.

> As we said in Transit Comm. v. Long Island R.R. Co. (253 N.Y. 345, 352) "when the change is required in behalf of other public service corporations or in behalf of municipalities exercising a proprietary instead of a governmental function", the common-law rule that utilities maintain their installations in public streets

> subject to the risk of relocating them at their own expense when public necessity so requires, does not apply.

Gillen Place at 222.

Gillen Place has nothing to do with the facts in this case. Gillen Place is a condemnation case. The Court of Appeals found that when the City of New York condemned Gillen Place it condemned CECONY's and Brooklyn Union's utility facilities and franchise. The utilities had purchased a permanent easement from the property owner and its facilities were in place under that easement, not under a franchise. The damage claim was judged to be the cost of relocating those facilities.

Here we are talking about a new service that CECONY is obligated to provide to a new cooperative apartment complex and a public/private parking facility. There is no dispute about CECONY's obligation to provide the electric service and they have done so with Gateway shouldering a considerable amount of the actual site work and all of the costs.

So the only question is whether CECONY can evade its responsibility under the specific terms of the underground portion of the tariff, compared to the more generalized relocation of an existing service. This situation is not a relocation of an existing service. Rather it is an abandonment of an existing service and the installation of a

new underground service to serve an entirely new project that re-purposes the site. The previous use was as a surface level parking lot. The new use is for a two-story parking garage beneath a four-story cooperative residential apartment complex. The existing electric service is not being relocated; it has been abandoned.

But even if one stretched credulity and assumed this is a relocation, one gets the same answer – CECONY is responsible for the relocation. Indeed, CECONY is routinely subjected to relocation costs due to interference projects. In Case 08-E-0539, CECONY presented a panel of expert witnesses to attest to the O&M and capital costs of interference projects. These experts, Messrs. Gencarelli and Cherian, explained what the term "interference" means.

> When a municipality performs work, such as installation or repairs to water mains, sewers and drainage facilities, reconstruction of roadways, curbs and sidewalks, and if the work affects the Company's Electric facilities, Con Edison must bear the costs to support and protect its facilities. (emphasis added.)

Municipal Infrastructure Support Panel – Electric, Case 08-E-0539, at pages 3 – 4.

These experts forecasted CECONY's interference costs for the rate year 1 ending March 31, 2010 at $76.5 million, rate year 2 at $96.5 million and rate year 3 at $80.8 million.

From a legal perspective, CECONY has a franchise that permits it to occupy the public streets, but that right is

inferior to the municipality's right to make improvements for public health, safety and welfare. When such improvements, such as the public parking garage, are necessary and interference occurs, CECONY has to move its facilities at its expense initially and then seek an allowance for such costs in its rate cases. In other words, the costs are socialized over the entire electric customer base.

Since CECONY routinely is allowed a significant level of interference costs in its current rates for electric service, charging Gateway for these costs is an impermissible double-dip and results in an unjust and undue prejudicial cost imposed on Gateway in violation of the Public Service Law.

The Public Service Law forbids unjust and unreasonable charges, it also forbids unduly discriminatory rates. Section 65:

> 1. Every gas corporation, every electric corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electric corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited.
>
> 2. No gas corporation, electric corporation or municipality shall directly or indirectly, by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation

> a greater or less compensation for gas or electricity or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.
>
> 3. No gas corporation, electric corporation or municipality shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(emphasis added).

Charging for the required underground electric service is unjust, unreasonable and subjects VillaBXV to "unreasonable prejudice or disadvantage."

The CECONY cost responsibility has been confirmed by the Appellate Division, First Department, in City of New York v. Consolidated Edison Co. of N.Y., Inc., 274 A.D.2d 189 (2000). In that case, the court was faced with a first impression issue: whether Section 24-521(b) of the Administrative Code of the City of New York

> which requires public utilities to bear the costs of protecting utility installations affected by public construction projects, overrides the common-law rule that the City must bear such "interference costs" when the utility installations are maintained pursuant to permanent easements purchased by the utility company from a private landowner, rather than pursuant to a franchise from the City.

The court noted that the common law rule was that the utility had an obligation to pay all costs associated with protecting their facilities during street repairs. The court explained:

> Underlying the common-law rule "is the concept of *franchise,* a special privilege which authorizes use of the public streets thereby creating a right where none existed before and which commensurately requires **[*192]** that the one to whom the privilege is granted assume the risk of relocation" (Tennessee Gas Transmission Co. v State of New York, 32 AD2d 71, 75 [emphasis in original], *affd* 27 NY2d 608).

Id. at 192.

The court further explained:

> By contrast, HN2 where the utility's right to construct and maintain its facilities is founded upon an easement, a valuable [***5] property interest, the common-law rule is that the utility is not responsible for the costs of relocating its facilities (supra). In Panhandle E. Pipe Line Co. v State Highway Commn. (294 US 613), the United States Supreme Court held that a pipeline company could not be required, without compensation, to relocate or alter its transmission lines to make room for a highway across the company's private right of way. Since the transmission lines were located on a permanent easement which the pipeline company had purchased for a substantial sum, the State's uncompensated interference with the company's property rights would be an unconstitutional taking (supra, at 618). New York Tel. Co. v State of New York (67 AD2d 745), a Third Department case, also recognized that the difference between a franchise and an easement can determine whether the utility or the government bears responsibility for interference costs.

Id. The court found that the NYC Administrative Code did not maintain the common law distinction between franchise and easement rights and held that CECONY was responsible to bear the costs of relocation.

> HN5 By imposing the protection and relocation obligation on the utilities, who are best equipped to find cost-effective

> and safe ways to shield their installations, section 24-521 (b) protects the public's interest in uninterrupted utility service and efficient completion of essential public works projects.

Id.

This is a new electric service to a new project that serves both public and private interests. If this were a relocation, it is due to the Village's decision to improve the public parking capacity at the train station, as well as to provide additional housing. The Village is acting here in its sovereign capacity and not it its proprietary capacity. And as can be seen by the decision in City of New York, the utility must bear the cost of relocating facilities in the Village street that are there due to the franchise awarded to CECONY. None of the trenching is done on private property subject to an easement.

CECONY has utterly failed to acknowledge or distinguish the case law that supports Gateway's position. Instead CECONY cites an inapplicable section of its tariff and a case that has no relevance to the instant dispute.

CECONY also cites General Rule 17.2 of its tariff. That provision lists "Special Services Performed by the Company at a Charge – Special Services at Cost". 17.2(b) references General Rule 5.2.2 as follows: "Change the point of service termination or location of the service lateral as set forth in General Rule 5.2.2;" along with other special services, such

as temporary service, etc. So that does nothing to undercut the General Rule 5.5.1. In fact, this project is going to result in dozens of new customers and is not a "special service" involving a new point of service to an existing customer.

Conclusion

CECONY has provided no substantive support from its tariff or case law. This Petition has demonstrated that CECONY is responsible for bearing all of the material and installation costs. Accordingly, the Commission should order CECONY to repay Gateway for all of the costs it has incurred, including material, engineering and installation, with interest. Furthermore, requiring the developer to bear the cost of electric service is a most unwise economic development policy and undercuts significantly the "New York is Open for Business" slogan that has been repeatedly used by the current administration in Albany.

Respectfully submitted,

Daniel P. Duthie

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On behalf of
East River Housing
Corporation

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