

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on November 7, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 07-E-0939 - In the Matter of the Petition of Herma Stribula and Jas Management Co., Inc., Complaining Against 210 East 86th Street Corp., City Cinemas Corporation, Consolidated Edison Company of New York, Inc., Department of Transportation of the City of New York, Department of Parks and Recreation of the City of New York, MECC Contracting, Inc. and Warren George, Inc.

ORDER DISMISSING PETITION

(Issued and Effective November 8, 2007)

BY THE COMMISSION:

INTRODUCTION

This proceeding concerns electric service improvements that are needed to accommodate the expansion of a commercial building in Manhattan. Petitioners own a residential building across the street from the commercial building and object to the installation of a transformer beneath the sidewalk that fronts their building. The Petition was initially referred to Office of Consumer Services (OCS), which notified Petitioners that jurisdiction over the matter rested with the New York City Department of Transportation (NYCDOT), which has permitting authority over the location and installation of an electric facility beneath a street or sidewalk in New York City (City). Petitioners thereupon sought a trial-type evidentiary hearing. We will not exercise jurisdiction over the location of subsurface transformers where, as here, a municipal entity has

permitting authority and no issues of inter-municipal conflict or statewide significance are presented. The Petition will be dismissed.

BACKGROUND

On January 14, 2003, an engineer representing 210 East 86th Street Corporation (hereinafter 210 East 86th Street) notified Consolidated Edison Company of New York, Inc. (hereinafter Con Edison) that two additional floors were to be added to the building at 210 East 86th Street, New York, New York, and that the electric service to the building would require improvements.

On April 17, 2003, Con Edison responded, acknowledging *inter alia* that two 1,000 KVA transformers with vaults and related equipment would be installed by Con Edison, and that 210 East 86th Street should reserve further space for a future transformer vault at the property.

Discussions between the two companies occurred throughout 2003. 210 East 86th Street objected that placement of two transformers at 210 East 86th Street would result in financial hardship because the existing space would not accommodate the improvements and the cost of relocating existing structures would be prohibitive.

On December 23, 2004, 210 East 86th Street filed a complaint against Con Edison with the Commission.¹ The parties agreed to binding arbitration, and an evidentiary hearing was held on July 20, 2004. On September 9, 2004 the arbitrator found:

...that two (2) additional transformers are reasonably necessary to supply the power that will be needed at 210 East 86th Street...and...that the 210 East 86th Street Corporation should either provide space within the basement or vault of its building ... without

¹ PSC Case No. 401668.

rental charges for one transformer and related infrastructure, or avail itself of the alternative plans for a mutually acceptable off site location at its own cost and expense.

The scope of the arbitration was limited to the need for the service improvements and the allocation of the cost for those improvements, pursuant to Con Edison's tariff. The arbitrator made no finding regarding the ultimate location of the transformers, and the arbitrator's decision included no discussion of that question other than a reference to a proposal discussed by the parties to locate one of the transformers "at a nearby offsite location directly across the street." The arbitrator noted that "the utility had not fully evaluated that suggestion as of the hearing date."

On December 4, 2006, Con Edison began excavation of test pits on property owned by the City of New York, under the jurisdiction of DOT. The test pits were located across the street from 210 East 86th Street, on the south side of 85th Street. The purpose of the test pits was to evaluate the feasibility of installing an underground transformer and associated equipment in that location.

On December 12, 2006, Herma Stribula and JAS Management Co, Inc., (hereinafter Petitioners) brought an action in Supreme Court, New York County seeking injunctive relief against "the excavation and installation of electrical transformer equipment in and upon the sidewalk abutting the building owned and operated by plaintiffs." Petitioners listed 210 East 86th Street, Con Edison, the DOT and others as defendants.

Supreme Court issued a temporary restraining order. On February 5, 2007, the Court vacated the temporary stay and dismissed the action without prejudice, pending further pursuit of administrative remedies, identifying the Commission and DOT.²

² Stribula, et al. v. 210 East 86th Street, et al., New York Supreme Court, New York County, Index No. 118478/06.

The Court stated, "There are a myriad of issues that may need attention before any resolution of this dispute can be resolved, including whether plaintiff has any standing to challenge the PSC determination, whether, in fact, it will suffer any damages and whether, in fact, there is any case or controversy at this point." The Court concluded that "Plaintiffs must make their case to these agencies before they can challenge their determinations as being arbitrary and capricious ... before this Court."

On April 9, 2007, Petitioners filed a Petition asking the Commission to: (1) vacate the arbitration decision and require that 210 East 86th Street make space available on its own premises or another location owned by its controlling entity; and (2) prohibit the construction of the transformers near Petitioners' building, order the restoration of the sidewalk to its original state, and require insurance and indemnification of Petitioners until such time.

The arguments of Petitioners can be summarized as follows:

1. Petitioners should have been included in the arbitration proceeding, once the location of a transformer near their property was discussed as a possibility.
2. Petitioners will be unduly burdened by the installation of a transformer beneath the sidewalk fronting their property.
3. 210 East 86th Street is the sole beneficiary of the improvements and it is unfair for any person other than 210 East 86th Street to be burdened by the improvements.

The petition was referred to OCS.³ On July 19, 2007 OCS addressed the petition with a letter stating, "The location of these facilities is still being considered by the Department of Transportation of the City of New York. That agency has jurisdiction of the location of the transformers."

On July 23, 2007, 210 East 86th Street filed a response to the Petition, stating *inter alia* that there are over 10,000

³ Case No. 710702.

similar facilities installed under the streets and sidewalks of Con Edison's territory, that the arbitrator was correct in finding that new transformers were needed, and that 210 East 86th Street will suffer substantial hardship if the construction of the service improvements is delayed.

On August 1, 2007, Petitioners sent a letter to OCS responding to the filing of 210 East 86th Street and urging the Commission to institute a formal hearing process to consider the April 9, 2007 petition. Petitioners' August 1 letter made no mention of the July 19 OCS letter.

On August 2, 2007, the New York City Department of Transportation issued a permit authorizing the installation of "one transformer and bus vault in front of 210 & 212 East 85th Street."

On August 3, 2007 a letter was submitted to OCS by MECC Contracting Inc. (MECC), the construction company retained by Con Edison to dig the test pits on the south side of 85th Street. MECC disputed Petitioners' claims that they were entitled to insurance and indemnification for any personal injury caused by the construction on the sidewalk fronting Petitioners' building. In a subsequent filing, MECC argued that the Commission lacks authority to grant such relief.

On August 8, 2007, Administrative Law Judge Stockholm issued a Procedural Ruling establishing a service schedule for responses to Petitioners' April 9 and August 1 filings. The Procedural Ruling required that Petitioners serve their August 1 filing on Con Edison and the City by August 17, 2007 and made August 27, 2007, the date for responses and September 7, 2007, the date for Petitioners' reply.

On August 21, 2007, a response was filed by EastSide Exhibition Corp. (hereinafter EastSide), a tenant of 210 East 86th Street that had been named as a defendant in Petitioners' action in Supreme Court. EastSide stated that its electrical needs had not changed substantially in recent years, that the need for electric service improvements was unrelated to any of its activities, that it was an "innocent bystander" to the

dispute, and that it had been forced to incur unnecessary expenses to defend itself. EastSide requested that it be dismissed from the Commission's proceeding.

On August 23, 2007, a response was filed by Con Edison. Con Edison asserted that the Commission has no jurisdiction over the placement of transformers in New York City, that the 2004 arbitration decision did not decide on the location of the transformer and hence did not damage Petitioners, and that Petitioners lack standing to challenge the arbitration decision because they have not been damaged by it.

On August 27, 2007, Petitioners replied to EastSide and MECC, and on August 28th Petitioners replied to Con Edison. Petitioners' argument regarding the Commission's jurisdiction is based largely on the Supreme Court order of February 5, 2007 which stated, "Plaintiffs must make their case to [NYC DOT and the Commission]." Petitioners state that "the court, in essence, remanded petitioners' grievance to [the Commission.]" Petitioners further argue that they are entitled to be heard before the Commission because Public Service Law Section 23(1) requires service of a Commission order "upon every person to be affected thereby."

Petitioners challenged Con Edison's assertion that the location of the transformer was not decided in the arbitration decision by citing passages from the decision which made reference to a possible alternative site. Petitioners also submitted evidence of planning and site preparation at the 85th street location during April, 2007, culminating in the removal of a tree on May 31, 2007, pursuant to a permit issued by the New York City Department of Parks.

DISCUSSION

Jurisdiction

Petitioners' requests for relief are based on the premise that the Public Service Commission exercises jurisdiction over the location of transformers within New York City. Petitioners have cited no statutory or legal authority

challenging the July 19, OCS letter that jurisdiction over such decisions on streets and sidewalks owned by the City lies with DOT, nor have they cited any instances of the Commission having exercised similar jurisdiction in the past.

It is undisputed that DOT has permitting authority over the subsurface facility at issue in this proceeding.⁴ DOT has, in fact, issued a permit for the construction of the facility. The Commission will not exercise jurisdiction over the location of a minor facility where a local permitting authority already exists and is exercising its authority. Exceptions could occur where issues of inter-municipal conflict or statewide importance are presented, but no such issues are presented here.

Petitioners' argument that Supreme Court has "remanded" the case to the Commission is incorrect. Supreme Court dismissed Petitioners' case pending an exhaustion of administrative remedies. There is nothing in the Supreme Court order that can be read as requiring the Commission to exercise jurisdiction where it otherwise would not.

Petitioners' other argument regarding jurisdiction is that they had the right to be notified of the arbitration decision, pursuant to Public Service Law Section 23(1) which requires service of an order on any person "to be affected thereby." The service requirement of Section 23(1) does not apply broadly to any person who might have an interest in the outcome of an order, or any person who is indirectly affected. It applies to a person to whom an order is directly applied. In this case, assuming the arbitration decision was an order and assuming that it determined the location of the transformer, then DOT as the owner of the affected property would be entitled to service under the statute.

The interpretation of Section 23(1) is not essential to disposition of this question, however, because the

⁴ See Chapter 71, New York City Charter, 2903(b)(5); Title 19, New York City Administrative Code; and Chapter 2, Title 34, Rules of the City of New York.

arbitration decision was not an "order of the Commission." The arbitration was performed by one member of the Commission in order to address the dispute between Con Edison and 210 East 86th Street. No order of the Commission was ever issued with respect to the arbitration. Section 11 of the Public Service Law establishes that "not less than a majority of [the] commissioners may ... exercise any power of the commission." An arbitration performed by a member of the Commission does not constitute an action of the Commission.

Moreover, the arbitration decision itself did not in any way determine the location of the transformer at issue. The arbitration resolved the need for the improvements and the allocation of costs for the improvements. The potential location of the transformers on, or off, the premises was relevant to the arbitration only insofar as it affected the allocation of costs. Clearly the possibility of offsite locations - and particularly the location across 85th Street - was discussed. However, the arbitration decision contained no discussion of the appropriateness of alternative locations. Nor should it have, because such matters were beyond the scope of the arbitration.

Process

Petitioners argue that because the matter was referred by Supreme Court for an exhaustion of administrative remedies, a formal hearing process was required. Supreme Court did not indicate that Petitioners' case should be given any particular treatment, let alone that the Commission must handle it. To the contrary, the Court simply noted that it was bound to defer to any administrative agencies that may have jurisdiction over the matter. Here the agency with jurisdiction is NYCDOT. Given that the factual matters raised by Petitioners need not be addressed, given our ruling on jurisdiction, no hearing - formal or otherwise - is required.

Other Issues

Con Edison argues that Petitioners lack standing. Our determination regarding jurisdiction renders the question of standing moot, although it should be noted that the Commission does not ordinarily invoke standing requirements.

Regarding Petitioners' request for insurance and indemnification, Petitioners indicate no source of authority for the Commission to establish such a requirement. Again, however, the issue is moot in light of our resolution of the question of jurisdiction.

Petitioners complain that Con Edison and 210 East 86th Street acted improperly by proceeding with site planning and preparation while the Petition of April 9, 2007, was still pending. The site developers acted pursuant to permits and procedures of the appropriate municipal authorities. No injunctive orders were in place.

With respect to the request of EastSide that it be dismissed from the proceeding, there is no valid action or complaint against EastSide in this proceeding.

CONCLUSION

The Commission is aware of Petitioners' strong desire to prevent any disturbance in the area surrounding their dwelling. The Commission takes such concerns into account when considering the siting of major facilities under PSL Article VII. The facility involved here is not an Article VII facility, however. Despite Petitioners' frequent references to the "extraordinary" nature of their case, Petitioners do not dispute that there are over 10,000 facilities similar to the proposed transformer located within the City. The Commission does not exercise jurisdiction over the location of a single underground transformer, where permitting authority for that facility clearly resides with a municipal government, and where no issues of inter-municipal conflict or statewide importance have been presented.

The Commission orders:

1. Petitioners' request for a trial-type evidentiary hearing is denied and their petition is dismissed.

2. This proceeding is closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary