brief

DAVIS POLK & WARDWELL
450 LEXINGTON AVENUE
NEW YORK, N.Y. 10017
212-450-4000

April 10, 2001

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Memorandum for: Hon. Janet Hand Deixler

Re: **Case Nos. 99-M-0811 and 00-C-0134**
Petition for Relief, Institution of Penalty Action and Revocation of CEC Authority

By Electronic Mail and Overnight Delivery

Hon. Janet Hand Deixler
Secretary
Department of Public Service
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Dear Secretary Deixler:

Enclosed please find one original and twenty-five copies of the Joint Memorandum of Consolidated Edison Company of New York, Inc. and Consolidated Edison Communications, Inc. in response to the April 5, 2001 Brief of Telergy Metro LLC ("Telergy") in the above-referenced cases.

Copies of this pleading and of this letter are simultaneously being served on Telergy (by electronic mail and by overnight delivery) and on the Commissioners and the Staff (by overnight delivery).

Very truly yours,

Carey R. Dunne

Enclosure

cc w/ enc: Hon. Maureen O. Helmer (PSC)
Hon. James D. Bennett (PSC)
Hon. Thomas J. Dunleavy (PSC)
Hon. Neal N. Galvin (PSC)
Hon. Leonard A. Weiss (PSC)
Lawrence Malone, Esq. (PSC)
Peter McGowan, Esq. (PSC)
Victoria A. Ramundo, Esq. (counsel for Telergy)
Stephen Rubin, Esq. (Telergy)
Marc Richter, Esq. (CECONY)
Joseph P. Stevens, Esq. (counsel for CECONY)
Edward P. Reardon, Jr., Esq. (CEC)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 00-C-0134	Complaint of Telergy Metro LLC Against Consolidated Edison Company of New York, Inc. and Consolidated Edison Communications, Inc. Concerning Telergy Metro's Access for Fiber Optic Facilities Across Consolidated Edison's Rights-of-Way
CASE 99-M-0811	Petition of Consolidated Edison Company of New York, Inc. for Approval of a License and Operating Agreement dated June 14, 1999, between Consolidated Edison and Consolidated Edison Communications, Inc.

JOINT MEMORANDUM OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. AND CONSOLIDATED EDISON COMMUNICATIONS, INC. IN RESPONSE TO THE APRIL 5, 2001 BRIEF OF TELERGY METRO, LLC

MARC RICHTER
DAVID WARNER
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
4 Irving Place
Room 1815-S
New York, New York 10003
(212) 460-4615

JOSEPH P. STEVENS
CULLEN AND DYKMAN
177 Montague Street
Brooklyn, New York 11201
(718) 855-9000

Attorneys for Consolidated Edison
Company of New York, Inc.

ROBERT B. FISKE, JR.
CAREY R. DUNNE
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
(212) 450-4800 (fax)

Attorneys for Consolidated Edison
Communications, Inc.

April 10, 2001

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JOINT MEMORANDUM OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. AND CONSOLIDATED EDISON COMMUNICATIONS, INC. IN RESPONSE TO THE APRIL 5, 2001 BRIEF OF TELERGY METRO, LLC

INTRODUCTION

This memorandum is submitted by Consolidated Edison Company of New York, Inc. ("CECONY") and Consolidated Edison Communications, Inc. ("CEC"), in response to the April 5, 2001 Brief (the "Brief" or "Telergy Brief") of Telergy Metro, LLC ("Telergy").

In its Brief, Telergy repeatedly claims that CEC and CECONY have "admitted" to willful violations of the Commission's prior orders, because they have acknowledged that CEC performed "make-ready" work – such as rodding, roping and the installation of innerduct – before obtaining a municipal franchise. CEC and CECONY did not and do not make any such admission of wrongdoing. CEC's pre-franchise make-ready work was lawful and appropriate; indeed, to prohibit such work – here or in any other case – would be to delay the development of a telecommunications network without any valid reason.

Telergy's central claim is that the Commission's orders directed CEC to obtain municipal franchises before performing make-ready work. However, this interpretation of the Commission's orders is wrong. The orders in question do *not* require CEC to obtain any particular franchises. The orders simply state that CEC will have to obtain franchises *if they are required under local law.* Since the make-ready work that CEC performed did not require a franchise, CEC did not violate local law – or, therefore, the Commission's orders.

Telergy's accusations of willfulness and bad faith, moreover, are belied by the fact that CECONY provided notice to the Commission Staff, to the City of New York, and to Telergy itself, that the make-ready work was being performed. Telergy did not object, since the same kind of pre-franchise, make-ready work had previously been performed for Telergy. The fact that

Telergy has waited until now – after months of silence – to complain about this CEC work demonstrates that Telergy's claims are not made in good faith. Finally, Telergy has provided no factual support for its allegations of harm, nor has it attempted to establish a legal or equitable basis for the extraordinary and anti-competitive relief it seeks. Instead, Telergy's most recent accusations are yet another step in its continuing campaign to avoid its contractual obligations and put CEC out of business.

ARGUMENT

I. CEC AND CECONY RECEIVED ALL REQUIRED APPROVALS FOR THE WORK THAT THEY PERFORMED

A. The Commission's Orders, and PSL § 99, Required Nothing More than Compliance with Any Applicable Local Requirements, and CEC and CECONY Complied with All Such Requirements

Telergy's principal argument is that the Commission's orders, and Section 99 of the Public Service Law, prohibited CEC from commencing construction in CECONY's rights-of-way before receiving a municipal franchise. Telergy argues that CEC's pre-franchise work was therefore prohibited. See Telergy Brief at 3-5.

Telergy's argument is based on a misleading reading of the orders at issue. The orders cited in the Telergy Brief state that CEC may not begin construction until receiving "all *requisite* local approvals"; "all *required* franchises and other local approvals"; "the *required* consent of the proper municipal authorities"; or "all *necessary* local municipal permits and/or other approvals." Telergy Brief at 3-4 & n.10 (emphasis added). The requirement of PSL § 99 is the same. See PSL § 99. In short, those orders and PSL § 99 simply require that CEC receive whatever franchise or other approval is required *under local law* for the type of work being done. They impose no new or independent requirement on CEC.

As is discussed at length in the April 5, 2001 Joint Submission of CECONY and CEC (the "April 5 Joint Submission"), CEC's work was at all times in conformity with municipal requirements. CEC required a franchise only for the installation of CEC-owned cable or telecommunications equipment.[1] Since no such cable or equipment was installed, no franchises were required; at the same time, the necessary Certificate of Public Convenience and Necessity, and all required manhole-access and street-opening permits, were obtained. See April 5 Joint Submission at 9 & n.9.[2] This work was fully consistent with the terms of CECONY's own City of New York franchise, as amended on May 22, 2000, which requires only that CECONY verify a telecommunications carrier's local authority "*to install and operate telecommunications cable.*" See May 22, 2000 Amendment at Appendix, p. 2 (emphasis added); April 5 Joint Submission at 8.[3] In accordance with this provision, it is and was CECONY's policy to permit

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[1] The Commission's orders state that any required local approvals must be obtained before CEC may "begin construction of *its* telecommunications facilities," L&O Order at 18; Spur Order at 9; or before CEC may "commence[] operations of *its* telecommunications network within [CECONY]'s transmission and distribution facilities and rights-of-way," Settlement Order at 10. See April 5 Joint Submission at 3-4 (emphasis added). Thus, the Commission's own orders are consistent with the proposition that CEC may perform work on CECONY's facilities as long as it does not install its own telecommunications cable or equipment. As noted above, no CEC-owned cable or equipment was installed in CECONY's facilities prior to CEC's obtaining its franchise; CECONY retains title to any innerduct installed in its conduits by a telecommunications company, and CEC has no ownership interest in the innerduct.

[2] In its Brief, Telergy also makes the tortured argument that, in performing make-ready work on CECONY's system, CEC was acting as CECONY's contractor, and that CECONY was thus providing "discretionary services" for purposes of the May 12, 2000 Three-Party Agreement. Telergy's argument seems to be that the make-ready work that CEC performed should have been performed by CEC, not for itself, but for Telergy. See Telergy Brief at 5 n.13. This argument is absurd. The fact that CEC conducted make-ready work on CECONY's system did not make CEC into a contractor hired by CECONY. As discussed in the April 5 Joint Submission, CECONY provided *no* discretionary services for CEC during the relevant period, and the other services that CECONY performed were allocated fairly between Telergy and CEC. See April 5 Joint Submission at 11-12. Thus, there was no violation of the Three-Party Agreement. During this period, Telergy was perfectly free to use its own crews – as did CEC – to conduct rodding and roping and to install innerduct in CECONY's facilities. If Telergy chose not to do so, it should not now be heard to complain about the consequences of that business decision.

[3] As discussed in the April 5 Joint Submission, CECONY's existing electrical franchises permit the installation of telecommunications equipment in its existing facilities. See April 5 Joint Submission at 5-7; see also American Rapid Tel. v. Hess, 125 N.Y. 641, 648, 26 N.E. 919, 920 (1891) (construing "electrical conductors" to include telephone and telegraph lines); Hoffman v. Capitol Cablevision System, Inc., 52 A.D.2d 313, 383 N.Y.S.2d 674 (3d Dept. 1976) (holding that power company's existing utility

(continued...)

telecommunications companies to rod, rope and install innerduct – but not to install fiber-optic cable – prior to receiving their local franchises. See April 10, 2001 Affidavit of Saumil Shukla (the "Shukla Aff."), submitted by CECONY in response to the Commission's March 30, 2001 Notice Establishing Procedures (the "Notice"), at ¶ 29.

In short, Telergy's argument concerning whether or not CEC's make-ready work constituted "construction" is both irrelevant and misleading. Whether or not that work was "construction," it was work for which CEC did not need a franchise. The work was consistent with local law, and neither the Commission's orders nor PSL § 99 required anything more.

B. The Pre-Franchise Work Was Disclosed to the Commission, the Relevant Municipalities, and Telergy

Telergy's characterization of CEC's and CECONY's actions as intentional violations of the Commission's orders is squarely refuted by the fact that the work was disclosed to the Commission – as well as to the City and to Telergy.[4] See April 5 Joint Submission at 10-11 and accompanying affidavits of Candida Canizio, at ¶¶ 14-17, and John McMahon, at ¶¶ 3-6. Under the circumstances, CEC's and CECONY's good faith cannot be questioned, and there is no basis for any allegation of willful wrongdoing.[5]

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[3] (...continued)
franchise permitted licensing use of its rights-of-way to cable company). Such a construction, moreover, is *required* by the Telecommunications Act of 1996. See 47 U.S.C. § 224(f)(1).

[4] In fact, *as Telergy itself has now admitted* (see Telergy Brief at 7), CECONY performed rodding, roping and innerduct installation for Telergy, at Telergy's request, prior to Telergy's receipt of its City of New York franchise. Moreover, Telergy's assertion – which, in contravention of the Commission's March 30 Notice, is not verified or supported by affidavit – that CECONY prohibited Telergy from performing make-ready work itself prior to receiving its franchise, is false. See Affidavit of Edward A. Bertolini, attached hereto as Exhibit A, at ¶¶ 3-6. *Having obtained the same pre-franchise benefit that it now seeks to deny to CEC, Telergy is in no position to complain.* Nor, as Telergy suggests, does it matter that CEC's License and Operating Agreement was approved (on December 21, 1999) by the Commission subject to CECONY's resolution of its then-pending franchise dispute with the City of New York. See Telergy Brief at 7. That dispute was resolved on May 22, 2000, prior to the period that is at issue here. Telergy's argument on this issue is a complete red herring.

[5] In addition to its discussion of CEC's pre-franchise work, Telergy, in its preliminary statement, repeats its allegations regarding CEC's minority interest in NEON Communications, Inc. ("NEON"). This (continued...)

Telergy's central claim is that, by virtue of CEC's alleged willful violations of the Commission's orders, Telergy has been competitively disadvantaged, and that CEC (Telergy's only existing competitor) should thus be put out of business. This claim is baseless for two reasons. Not only has CEC not (intentionally or otherwise) violated any orders, but Telergy has not been harmed at all. As set forth in the affidavits of Thomas Caruso and Saumil Shukla, the extent of CEC's network construction remains well behind Telergy's, and CECONY has done *more* work for Telergy than for CEC since June 2000.[6] See Shukla Aff.; April 10, 2001 Affidavit of Thomas Caruso (the "Caruso Aff."), submitted by CEC pursuant to the Notice. CECONY and CEC have acted lawfully and in good faith, and there is no basis for Telergy's claims of harm.

II. THERE IS NO LEGAL BASIS FOR TELERGY'S REQUESTED RELIEF

A. Telergy Has Demonstrated No Basis for the Imposition of a Stay

While Telergy has identified three cases in which the Commission has granted interim relief, it has not even attempted to demonstrate that such relief would be appropriate here.[7] The Commission has routinely denied interim relief where the party seeking a stay has failed to show, not only a likelihood of success on the merits, but also that it would be irreparably harmed absent

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[5] (...continued)
topic is beyond the proper scope of the April 5 briefing, as defined in the Notice. It is nevertheless without merit. *Most importantly, CEC and CECONY have not – as Telergy claims – admitted to any violations of law (or any other improprieties) concerning CEC's investment in NEON.* See Telergy Brief at 2. As discussed in CEC's March 26, 2001 Response to the Petition, CEC owns only 11.6% of NEON, and does not control NEON in any way. See CEC Response at 5. Consequently, any relationship between CEC and NEON is an arms-length, contractual relationship, and Telergy therefore cannot claim to have been harmed by CEC's investment in NEON. Finally, because NEON is a Delaware corporation, it does not fall within the scope of PSL § 100, which applies only to investments in New York corporations. See PSL § 100.

[6] The Telergy Brief attaches as exhibits website pages which, according to Telergy, demonstrate that CEC has understated the extent of its network buildout in its submissions to the Commission, and in fact has surpassed Telergy in its progress. These accusations are baseless. CEC has not yet finished its backbone, nor has it completed any of the rings that Telergy alleges have been constructed. See Caruso Affidavit, at ¶ 15. The extent of CEC's progress over time, as well as the services provided by CECONY to CEC and Telergy, are set out in CEC and CECONY's separate submissions made simultaneously with this memorandum.

[7] Moreover, as noted in the April 5 Joint Submission, Telergy has identified no statutory basis for the Commission's authority to grant interim relief in this case.

interim relief, and that the public interest weighs in favor of such relief. See, e.g., Long Island Lighting Company – Shoreham Ratemaking Principles, Cases 28252, 29024 and 29029, 1985 N.Y. PUC LEXIS 6 at *4 (N.Y. Pub. Serv. Comm'n Dec. 26, 1985) (denying petition for injunctive relief because petitioner "provided no basis for [that] extraordinary step"); Petition of Niagara Mohawk Power Corp., Case 00-E-0454, 2000 N.Y. PUC LEXIS 797 at *10 (N.Y. Pub. Serv. Comm'n Sept. 28, 2000) (discussing standard for preliminary relief).[8]

Here, as discussed in the April 5 Joint Submission, Telergy will not be irreparably harmed absent interim relief. To the contrary, a stay would irreparably harm CEC. Moreover, the public interest weighs strongly against a stay, which would delay a competitor's entry into the telecommunications market. See April 5 Joint Submission at 19-20 and accompanying Affidavit of Dr. Alfred E. Kahn. Finally, a stay would violate Section 253 of the Telecommunications Act of 1996. See 47 U.S.C.A. § 253; April 5 Joint Submission at 20-22.

B. Telergy's Demand for the Revocation of CEC's License Is Frivolous

Finally, Telergy argues that the Commission should revoke CEC's Certificate of Public Convenience and Necessity ("CPCN"). However, the Commission decisions on which Telergy

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[8] The cases that Telergy cites are clearly distinguishable from this case. Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation, Case 96-E-0134 (N.Y. Pub. Serv. Comm'n Feb. 16, 1996), is a rate case, where the Commission's temporary suspension of new rates was done pursuant to its explicit statutory authority to suspend rates and impose temporary rates pending the conclusion of a rate proceeding in PSL § 66(12); there, the Commission's action was intended – unlike here – to *preserve* the status quo. In Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law, Case 98-C-0689 (N.Y. Pub. Serv. Comm'n Aug. 22, 2000), the Commission merely delayed the implementation of its own order while a petition for rehearing concerning that order was pending; again, the status quo was maintained.

In New York State Elec. and Gas Corp. v. Niagara Mohawk Power Corp., Case 96-E-0534 (N.Y. Pub. Serv. Comm'n Jan. 15, 1997), the Commission found that the defendant's construction would duplicate the plaintiff's facilities, violating a Commission policy against "uneconomic investment in duplicate facilities" by regulated utilities. There, the public interest weighed in favor of a stay because continued construction could "result in over-construction of facilities by competing utilities, with the associated costs ultimately being borne by consumers and with potentially unacceptable environmental impacts." Here, there is no duplication of facilities; by contrast, there is *under*-construction, and a *lack* of competition, and the public interest undeniably weighs in favor of future development in this telecommunications market. *In short, none of these cases involved the type of dramatic and anticompetitive remedy that Telergy is requesting here.*

relies provide no support whatsoever for this extraordinary request. See Telergy Brief at 9 n.18. In each of those three cases, a company's CPCN was revoked for technical reasons: in one, the company had informed the Commission that it no longer intended to offer telecommunications services within New York State, and that it would not make the tariff filing required by the CPCN; in another, the company had merged into another company and no longer required a CPCN of its own; in the third, the company had dissolved. See Recommendation that the Commission Revoke the CPCN issued to Advantage Communications, Inc., Case 94-C-0517 (N.Y. Pub. Serv. Comm'n April 8, 1996); Recommendation that the Commission revoke the CPCN issued to DNS Communications, Inc., Case 95-C-0738 (N.Y. Pub. Serv. Comm'n April 8, 1996); Recommendation that the Commission cancel the CPCN granted to AmeraTel USA, Cases 96-C-0633 and 95-C-1091 (N.Y. Pub. Serv. Comm'n August 12, 1996). In none of these cases did the company at issue even oppose the revocation of its CPCN; in fact, in the third case, the company itself had requested the revocation. See AmeraTel USA at 2.

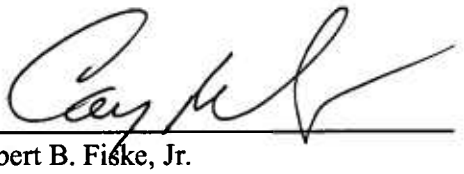
It is telling that Telergy had to resort to these "authorities" in support of its irresponsible demand for the imposition of a Commission "death sentence" upon CEC. Such a remedy would be unprecedented and unjust, since CEC's good faith, coupled with the absence of any harm to Telergy, make it clear that there is no basis for Telergy's requested relief. Moreover, as is discussed in the April 5 Joint Submission, even a temporary stay of CEC's activities would have a serious adverse impact on competition, and the elimination of CEC as a competitor would be a major setback to the rapid development of a competitive facilities-based telecommunications network in the local market. Consequently, such a remedy would violate the Telecommunications Act of 1996. See April 5 Joint Submission at 20-22.

CONCLUSION

For the reasons set forth above, CECONY and CEC respectfully request that Telergy's proposed remedies be denied and that its Petition be dismissed.

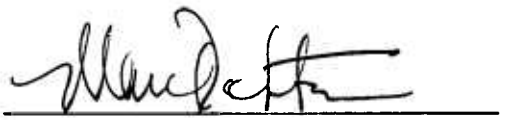
Dated: New York, New York
April 10, 2001

Respectfully submitted,



Robert B. Fiske, Jr.
Carey R. Dunne
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
(212) 450-4800 (fax)

Attorneys for Consolidated Edison Communications, Inc.



Marc Richter
David Warner
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
4 Irving Place
Room 1815-S
New York, New York 10003
(212) 460-4615

Joseph P. Stevens
CULLEN AND DYKMAN
177 Montague Street
Brooklyn, New York 11201
(718) 855-9000

Attorneys for Consolidated Edison Company of New York, Inc.

EXHIBIT A

PRIVILEGED AND CONFIDENTIAL

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 00-C-0134	Complaint of Telergy Metro LLC Against Consolidated Edison Company of New York, Inc. and Consolidated Edison Communications, Inc. Concerning Telergy Metro's Access for Fiber Optic Facilities Across Consolidated Edison's Rights-of-Way.
CASE 99-M-0811	Petition of Consolidated Edison Company of New York, Inc. for Approval of a License and Operating Agreement dated June 14, 1999, between Consolidated Edison and Consolidated Edison Communications, Inc.

AFFIDAVIT OF EDWARD A. BERTOLINI
IN OPPOSITION TO THE PETITION
OF TELERGY METRO LLC

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

Edward A. Bertolini, being duly sworn, deposes and says that to the best of my information, knowledge and belief:

1. My name is Edward A. Bertolini. I am a Section Manager in the Distribution Engineering Department at Consolidated Edison Company of New York, Inc. ("CECONY").

2. During the period March 1998 through October 1998, I served as project manager for the Telergy telecommunications project.

3. At a meeting on April 7, 1998 among CECONY and Telergy representatives, Telergy and CECONY discussed Telergy's February 3, 1998 request that CECONY perform rodding and roping and innerduct installation services for Telergy. At that meeting,

CECONY recommended that Telergy issue an RFQ [Request for Quote] to contractors and to Con Edison for this work.

4. Telergy thereafter expressed a preference that CECONY perform these services and CECONY agreed to do so.

5. CECONY commenced rodding and roping and innerduct installation for Telergy in July 1998.

6. Accordingly, at no time did I or, to the best of my knowledge, anyone else at CECONY, advise Telergy that it was not permitted to use its own contractors to perform rodding and roping or innerduct installation services in CECONY's underground facilities, either before or after Telergy received its New York City telecommunications franchise on November 10, 1998.

Edward A. Bertolini

Sworn to before me
this 10th day of April, 2001

SARA SCHOENWETTER
Notary Public, State of New York
No. 41-4690715
Qualified in Queens County
Commission Expires September 30, 2001