

The Commonwealth of Massachusetts
DEPARTMENT OF PUBLIC UTILITIES

CAMBRIDGE MA
January 20, 1988

D.P.U. 87-214

Petition of Boston Edison Company under the provisions of G.L. c. 40A, sec. 3, for the exemption of certain premises, underground lines, and equipment from the operation of the Zoning Code of the City of Boston and the Zoning Ordinance of the City of Cambridge.

APPEARANCES: Mary Elizabeth Stanton-Cotter, Esq.
Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199
FOR: BOSTON EDISON COMPANY
Petitioner

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I. INTRODUCTION

On October 23, 1987, Boston Edison Company ("BECo" or "Company") petitioned the Department of Public Utilities ("Department") under the provisions of G.L. c. 40A, sec. 3, for the exemption of certain premises, underground lines, and equipment ("line" or "project") from the operation of the Zoning Code of the City of Boston and the Zoning Ordinance of the City of Cambridge ("zoning code[s]"). The Department had earlier determined that the line is necessary and would serve the public convenience under G.L. c. 164, sec. 72. Boston Edison Company, D.P.U. 86-255 (1987). On December 8, 1987, the Department issued an Order of Notice and required the Company to publish notice in the Boston Globe, the Boston Herald, and the Cambridge Chronicle. The Department ordered the Company to serve notice on selected municipal officials in Boston, Cambridge, and certain surrounding towns. The Company made return of service in accordance with the terms of the Order of Notice.

The Department held a combined public and evidentiary hearing on the petition at Gardner Auditorium in the State House at Boston on the evening of January 6, 1988. The Commission designated James Connelly, Esq., as hearing officer. The Company presented three witnesses: Arthur L. Bartlett, Esq., a partner in the Boston law firm of Johnson, Clapp, Stone & Jones, who testified concerning the need for exemption from the zoning codes; Gregory R. Sullivan, manager of the distribution and planning section of the Company's electrical engineering and

station operations department, who testified concerning the need for the line to serve the downtown Boston distribution system; and Louis R. Delaplace, principal engineer in the transmission division of the Company's electrical engineering and station operations department, who testified concerning the reasons for choosing the proposed route and the results of the Company's negotiations with real property owners affected by the project. The Company offered fourteen exhibits, which were moved into evidence. Upon the Company's motion, testimony and exhibits concerning the project offered in D.P.U. 86-255 were incorporated by reference into the record of the instant proceeding (Tr. 7). Neither the Attorney General nor any other person sought to intervene. No member of the public sought to speak.

II. DISCUSSION

A. The Line's Functional and Technical Features

Mr. Delaplace testified that the project entails installing a 345 kilovolt (KV) transmission line, encased in a cable conduit and buried underground. The line would originate at the Company's Mystic Generating Station in Everett and terminate at the Company's Kingston Street substation in downtown Boston. The line's route would be approximately four miles long (Tr. 44-48). The map in Exhibit BE-7 depicts the route.

Mr. Sullivan testified concerning the need for the line and described its function within the BECo system (Tr. 24-43; Boston Edison Company, D.P.U. 86-255, Exh. BE-36, p. 6, incorporated by reference). He testified that for two reasons, the line was

needed to reinforce the downtown Boston distribution system (Tr. 28-33). First, periods of high demand pose a serious risk of overload for the Company's existing 115 KV network in the event that an outage at BECo's New Boston generating station happens to coincide with the loss of any of the 115 KV lines downtown. Computer simulations, Mr. Sullivan stated, show potential for damage to key system components in the absence of the transmission system reinforcement proposed by the Company. Were that eventuality to arise, Mr. Sullivan maintained, up to 25 percent of BECo's downtown customers would face disconnection by Company action in order to restore power flow to safe levels (id.). The second reason Mr. Sullivan adduced was the potential loss of the Company's 345 KV line from Tewksbury to Woburn during peak-demand periods. Loss of the 345 KV line under heavy load conditions would cause damaging overloads and unacceptably low voltage on the 115 KV system (D.P.U. 86-255, Exh. BE-36, pp. 11-15). For these reasons, Mr. Sullivan averred, the line is necessary for the safe and effective operation of the downtown distribution system.

Mr. Delaplace testified as to the other physical features of the line. To summarize his testimony, the underground cable that constitutes the line will consist of three separately insulated conductors housed in a steel pipe. The steel pipe itself will be insulated from the surrounding earth to prevent corrosion and filled with an insulating liquid. The Company plans to install two such pipes of 8.5-inch diameter. Only one

set of conductors will be put in place initially, Mr. Delaplace testified; but the Company plans to install a second set in the near future. Additionally, two polyvinylchloride (PVC) conduits will house fiber optic cables for a protective relay system. The PVC conduits will be installed at the bottom of the 345 KV transmission line trench. The two steel pipes, Mr. Delaplace stated, will be set in the trench with two-foot axial spacing at a depth of five feet and supported six inches above the trench bottom. The initial backfill to a height of 12 inches above the pipes will consist of concrete; and the remainder of the excavation will consist of backfill material and temporary paving until the permanent paving repair is made (Tr. 48-52; Exh. BE-6).

B. Zoning Considerations and the Parcels Subject to the
Petition

The proposed route transects certain privately and publicly owned parcels of land. Zoning exemptions are required for construction on all these parcels, Mr. Bartlett testified; but the Company presently seeks zoning exemptions for four of them (for convenience, these are hereinafter denominated "Parcels 1, 2, 3, and 4" and are described infra) (Tr. 7-8; Petition, pp. 2-11). Mr. Delaplace testified that the Company plans to seek zoning exemptions for other parcels later (Tr. 53), but that the owners of Parcels 3 and 4 request that construction on their lands be completed before the close of February 1988 (Tr. 56-57).

All four parcels are described in the Company's petition (pp. 2-11) and in testimony (Tr. 54). Parcel 1 lies generally in Charlestown but straddles the Boston-Cambridge city line. Parcel 2 lies in Boston near Leverett Circle, adjacent to the Charles River and to Nashua Street. Parcel 3 is the Boston Common, public parkland owned by the City of Boston. Parcel 4 is located between Tremont Street and Mason Street along the former Mason Place, a discontinued public way running perpendicular to the Boston Common (Tr. 12). All four parcels lie within the City of Boston. Only Parcel 1 lies partly within another municipality (the City of Cambridge) (Petition, pp. 2-11; Exhs. BE-1 through BE-4).

The Company offered the testimony of Mr. Delaplace to describe the property interests it has, or expects to be granted, in the four parcels. Parcel 1, the property of the United States Government, is already subject to temporary and permanent easements granted to the Company by the General Services Administration ("GSA") and recorded in the Suffolk and Middlesex Registries of Deeds (Tr. 55; Exh. BE-1).

Parcel 2 is the property of the Commonwealth of Massachusetts and is under the management of the Division of Capital Planning and Operations ("DCPO"), an agency of the Commonwealth. The Company will construct the line on Parcel 2 under license from DCPO; but, according to Mr. Delaplace's testimony, BECo expects to seek special legislation from the General Court of the Commonwealth to authorize DCPO to convey a permanent easement to the Company (Tr. 55; Exh. BE-2).

With respect to Parcel 3, the Boston Common, the Company represents that agencies of the City of Boston have agreed to grant the Company a permit for construction and are amenable to passage of special legislation enabling the City to grant a permanent easement for the line on the Boston Common (Tr. 56). The Company states, without elaboration, that reliance on a revocable license, rather than on a permanent easement, "could jeopardize the Company's transmission line" and adversely affect the attractiveness of its bonds (Response to Record Request HO-2).

Parcel 4, the property of the Tremont Place Realty Trust, is subject to a permanent easement in favor of the Company and recorded in the Suffolk Registry of Deeds (Tr. 57). Parcel 4 is presently under site development for construction of a commercial-residential complex; and its owners have requested that the Company complete construction work on the parcel consistent with the overall site development schedule (Tr. 57).

Mr. Bartlett offered testimony concerning the need for a zoning exemption for each of the four parcels. Parcel 1, the GSA property, is classified as an "Industrial B (IB) District" by the Cambridge zoning code (Tr. 12; Exhs. BE-1 and BE-11, Cambridge Zoning Districts map, as amended to June 1983) and as an "Industrial I-2 (General Industrial) District" by the Boston zoning code (Tr. 13). The remaining parcels are governed solely by the Boston zoning code. Parcel 2 lies within a "Industrial I-2 (General Industrial) Districts" (Tr. 13-15). Parcel 3 was

reclassified on January 4, 1988 from an "H-2-65 (Apartment Residential) District" to an "OS (Open Space) District" (Tr. 15-16; Response to Record Request HO-1). Parcel 4 lies within a "B-10 (General Business) District" (Tr. 16-17).

In general, Mr. Bartlett stated, exemptions from the zoning codes are required because both codes permit only those uses and types of construction specifically referred to in the codes. In neither zoning code, Mr. Bartlett testified, is there a provision that specifically states, or may fairly be taken to imply, that electric transmission lines are permitted on private lands (Tr. 18; Exh. BE-8, secs. 8-2 and 8-7; Exh. BE-10, Art. 4.13).

III. ANALYSIS AND FINDINGS UNDER G.L. C. 40A, SEC. 3

G.L. c. 40A, sec. 3, provides, in pertinent part:

Land, or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the [D]epartment of [P]ublic [U]tilities shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public

Section 3 further provides that where structures or lands for which zoning exemption is sought lie within two or more municipalities, there must be notice to all affected municipalities and a hearing in one of the municipalities in order to satisfy the notice and hearing requirements of the law. Upon proper return of service by the Company, the

Department finds that the notice and hearing requirements of Section 3 are satisfied: service was made upon the appropriate officials in the affected municipalities, and a hearing was held in one of these municipalities (i.e., Boston).

The Department also finds that BECo is a public service corporation within the meaning of G.L. c. 40A, sec. 3. Attorney General v. Haverhill Gas Light Company, 215 Mass. 394, 398 (1913). BECo is, therefore, authorized to petition the Department for the exemptions sought in this proceeding.

For the reasons set forth below, the Department further finds that construction of the line would require exemptions from the zoning codes of Boston and Cambridge as described in the testimony the Company sponsored. Both zoning codes authorize only those uses explicitly stated for the districts in question. The construction of electric transmission lines is not provided for in either code's treatment of authorized uses (Exhs. BE-8 through BE-11; Response to Record Request HO-1). The principle of statutory construction expressio unius est exclusio alterius is explicitly adopted by both zoning codes (Exhs. BE-8, sec. 8-2, and BE-11, sec. 4.13). Therefore, because both codes are silent on the proposed use of Parcels 1, 2, 3, and 4, the proposed use must be regarded as non-conforming and hence as requiring the exemptions sought by the petition, before construction may commence.

Finally, the Department concludes that the testimony and exhibits in this and in the prior proceeding (D.P.U. 86-255)

warrant a finding that the line is "reasonably necessary for the convenience or welfare of the public" in order to continue reliable electric service to downtown Boston. In so finding, however, the Department cautions that its decision in this matter in no way represents a determination that the project is economically beneficial to the Company's ratepayers, for such economic issues have not been treated in this proceeding. The Department's Order, therefore, may not be construed as a ruling on the appropriate ratemaking treatment to be accorded the Company's construction of the line.

IV. ORDER

Accordingly, after due notice, public hearing, and consideration, the Department

DETERMINES: That the proposed line requires exemption under G.L. c. 40A, sec. 3, from the zoning codes insofar as the codes do not permit construction of the proposed line in an "Industrial I-2 (General Industrial) District," an "Open Space (OS) District," or a "B-10 (General Business) District" in the City of Boston and in an "Industry B (IB) District in the City of Cambridge; and

FINDS: That the proposed use of the land along the route of the proposed line is reasonably necessary for the convenience or welfare of the public under the terms of G.L. c. 40A, sec. 3; and it is

ORDERED: That the petition of the Boston Edison Company be allowed and that the 345 KV line, as described in the Company's

testimony and exhibits on file with the Department, be exempt from the operation of the Zoning Code of the City of Boston and of the Zoning Ordinance of the City of Cambridge, pursuant to G.L. c. 40A, sec. 3, to the extent that Parcels 1, 2, 3, and 4 may be used for electric power transmission purposes, as represented in testimony and exhibits to the Department; and it is

FURTHER ORDERED: That the Boston Edison Company shall, within five business days following issuance of this Order, serve by first class mail a copy of this Order on all public officials who were entitled to notice under the terms of the Order of Notice, dated December 8, 1987, on the cognizant officials at the General Services Administration and the Division of Capital Planning and Operations, and on the trustees of the Tremont Place Realty Trust and that the Company shall, within ten business days, certify that service of this Order to the persons specified has been effected.

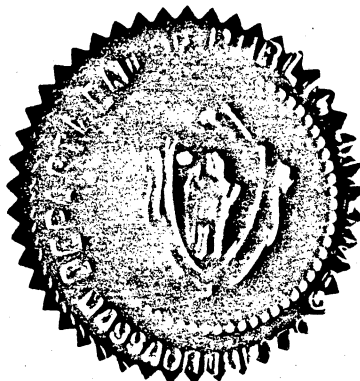
By Order of the Department,

/s/ BERNICE K. MCINTYRE

Bernice K. McIntyre, Chairman

A true copy
Attest;

Mary L. Cottrell
Mary L. Cottrell
Secretary



Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Section 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

3.

PS-67

Comm. from the Dept. of Public Utilities Re:
its decision on the petition of Boston Edison
Co. under the provisions of the Mass. General
Laws, Chapter 40A, Section 3 for the exemption
of certain premises, underground lines & equip-
ment from the operation of the Zoning Code of
the City of Boston & the Zoning Ordinances of
the City of Cambridge.

copy sent to the City Manager
2/3/88 mlr

In City Council,

February 1, 1988

Referred to the
City Manager