

**VILLAGE OF LOMBARD**  
**REQUEST FOR BOARD OF TRUSTEES ACTION**

For Inclusion on Board Agenda

\_\_\_\_\_ Resolution or Ordinance (Blue) \_\_\_\_\_ Waiver of First Requested  
\_\_\_\_\_ Recommendations of Boards, Commissions & Committees (Green)  
  X   Other Business (Pink)

**TO:** ACTING VILLAGE PRESIDENT AND BOARD OF TRUSTEES  
**FROM:** David A. Hulseberg, Village Manager  
**DATE:** November 27, 2012 (COW) (B of T) **Date:** December 6, 2012  
**TITLE:** Main Street Sewer Damage - Settlement Agreement & Mutual Release  
**SUBMITTED BY:** Carl S. Goldsmith, Director of Public Works *Cy*

**BACKGROUND/POLICY IMPLICATIONS:**

The Village of Lombard has reached negotiated a Settlement Agreement and Mutual Release with ComEd and Patrick Engineering relative to damage in the 500 block of South Main Street.

**FISCAL IMPACT/FUNDING SOURCE:**

Review (as necessary):  
Village Attorney X \_\_\_\_\_ Date \_\_\_\_\_  
Finance Director X \_\_\_\_\_ Date \_\_\_\_\_  
Village Manager X \_\_\_\_\_ Date \_\_\_\_\_

**NOTE:** All materials must be submitted to and approved by the Village Manager's Office by 12:00 noon, Wednesday, prior to the Agenda Distribution.



November 28, 2012

TO: Acting Village President and Board of Trustees

THROUGH: David Hulseberg, Village Manager

FROM: Carl Goldsmith, Director of Public Works *CG*

RE: Sanitary Sewer Damage – 500 Block of Main Street

**Background**

On September 2, 2008, a ComEd crew installed new 55-ft poles on the 500 S. Block of Main Street, Lombard. A resident reported a sanitary backup the next day and our utility personnel discovered that four of the new poles had crushed through the Village's 8"-diameter clay sanitary sewer. Pieces of the sewer were clearly visible in the spoil piles at the four poles at 508/512, 516/520, 520/528, and 532/536 S. Main Street. The sewer had been marked with green paint on that block for JULIE locate requests on 5/19/08, 5/27/08, 6/9/08, 6/20/08, 7/1/08, 7/15/08, 7/16/08, 7/25/08, 8/1/08, 8/18/08 and 8/19/08 for the installation of streetlight poles and utility poles. It appears that the older ComEd poles that were being replaced were either above or immediately adjacent to the sewer and the new poles extended through the sewer due to their deeper bury depth.

The sanitary sewer was damaged beyond repair so a new 690-ft, 8" diameter sewer had to be constructed next to the damaged one and the service laterals extended. In the meantime, Village personnel pumped sewage out of the damaged sewer in order to prevent the basements of these 13 homes from flooding, particularly during and after rains. The Village incurred personnel expenses totaling \$5,993.76 for this emergency pumping operation.

The Village obtained a proposal from John Neri Construction Co., Inc. for the emergency construction of a replacement sewer. It was initially hoped that the replacement sewer could be installed under the sidewalk. However, the proximity of other underground utilities including an AT&T duct, streetlight cables, the ComEd poles and the former sanitary sewer precluded this location. As a result, the replacement sanitary sewer was installed under the westernmost pavement lane. This change, combined with time-consuming avoidance of water service lines and an abandoned sewer manhole in conflict with the alignment, resulted in longer construction and higher costs. Neri's final costs total \$315,172.95.

**Claim History**

Public Works Department staff had met with ComEd's foreman at the site on September 4, 2008 and he understood and accepted that the poles had damaged the sewer to an irreparable extent and that the Village had to proceed with corrective action immediately

to protect the residents. He had advised to submit a claim to the Claims Department immediately. The Village sent a preliminary claim form to ComEd by email and First Class mail on September 5, 2008, before starting the work on September 8, 2008. The cover letter to the preliminary claim form explained that an emergency work contract would begin as soon as possible and that a final claim form would be provided after knowing the final costs. The Village received a letter from the ComEd claims department dated October 8, 2008 that stated that ComEd was denying the preliminary claim.

The Village submitted the final claim request on December 22, 2008 and requested that ComEd review the matter. This claim request was in the amount of \$321,516.11. The Village received a verbal offer to settle the matter for a lump sum payment of \$40,000 on or about February 6, 2009. The Village staff discussed the settlement offer and rejected ComEd's settlement offer. The Village's response was tendered on approximately February 13, 2009. As a result of the denial of the claim and the settlement offer put forward by ComEd, Village staff was directed to proceed with litigation on the matter. The Village filed suit against ComEd and Patrick Engineer who served as design engineer for the pole relocation project.

As a result of the depositions and pre-trial settlement discussions, the Village, ComEd and Patrick Engineering have reached a settlement on this matter. The Settlement Agreement and Mutual Release provides for the following:

- The Village of Lombard will settle all claims against ComEd and Patrick Engineering in exchange for a total amount of \$240,000
- In consideration of the settlement payment, the Village releases ComEd and Patrick Engineering from any current or future actions relative to the damage incurred as a result of ComEd's actions on September 2, 2008.
- As a result of the Settlement Agreement and Mutual Release, the lawsuit against ComEd and Patrick Engineering shall be dismissed with prejudice in its entirety.
- Each party shall be responsible for their own costs for legal fees and costs relative to the lawsuit.

### **Recommendation**

The Settlement Agreement and Mutual Release is consistent with the direction previously provided to staff and counsel by the Village Board. As such, the staff recommends that the Acting Village President and Board of Trustees approve a Settlement Agreement and Mutual Release between the Village of Lombard, ComEd and Patrick Engineering.

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT  
DUPAGE COUNTY, ILLINOIS

VILLAGE OF LOMBARD, an Illinois Municipal Corporation,	)	
	)	
Plaintiff,	)	
v.	)	No. 2010 L 26
	)	
COMMONWEALTH EDISON COMPANY, an Illinois Business Corporation,	)	
	)	
Defendant.	)	
-----	)	
COMMONWEALTH EDISON COMPANY,	)	
	)	
Defendant/Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
PATRICK ENGINEERING, INC.,	)	
	)	
Third-Party Defendant.	)	

**SETTLEMENT AGREEMENT AND MUTUAL RELEASE**

1. This Settlement Agreement and Mutual Release is made and entered into by and between the undersigned parties, Plaintiff, VILLAGE OF LOMBARD, COMMONWEALTH EDISON COMPANY (hereinafter referred to as "ComEd"), and PATRICK ENGINEERING INC., (hereinafter "PATRICK").

2. The Plaintiff VILLAGE OF LOMBARD has filed a Complaint in the Circuit Court of DuPage County, Illinois under Case Number 2010 L 26 (hereinafter the "Lawsuit"). The Lawsuit arises out of an alleged incident (hereinafter referred to as the "Occurrence") that occurred on or about September 2, 2008 in the 500 block of South Main Street, Lombard, Illinois

which allegedly caused damage to the sewers, pipes and property of the VILLAGE OF LOMBARD.

3. In the Lawsuit, ComEd has also filed a Third Party Complaint against PATRICK.

4. The parties to the Lawsuit have participated in pre-trial settlement discussions wherein Plaintiff VILLAGE OF LOMBARD has agreed to settle its claims against ComEd and PATRICK in exchange for payment in the total amount of \$240,000, and ComEd has agreed to settle its claims against PATRICK in exchange for PATRICK'S contribution to the settlement paid to Plaintiff VILLAGE of LOMBARD.

5. Pursuant to this Settlement Agreement and Mutual Release, the respective payments being made to the Plaintiff VILLAGE OF LOMBARD on behalf of ComEd and PATRICK are as follows:

A. \$217,500.00 to be paid on behalf of ComEd;

B. \$22,500.00 to be paid on behalf of PATRICK;

6. In consideration of the payments set forth in Section 5 above, the Plaintiff VILLAGE OF LOMBARD completely releases and forever discharges ComEd and PATRICK and their respective heirs, executors, administrators, agents, officers, directors, successors and assigns, of and from any and all past, present or future claims, obligations, property damage actions, negligence actions, willful and wanton conduct actions, statutory actions, trespass actions, actions pursuant to the Underground Utility Facility Damage Prevention Act, breach of contract actions, contribution actions, indemnity actions, damages, losses, and causes of action of any nature whatsoever, whether based in tort, contract or other theory of recovery, which the Plaintiff VILLAGE OF LOMBARD now has, or may have in the future, on account of or that in

any way arise out of known and unknown losses, property damages, pecuniary losses of any kind, and damages of any kind sustained by Plaintiff VILLAGE OF LOMBARD as a result of the Occurrence which is otherwise described in the Complaint at Law and all Amended Complaints in Case No. 2010 L 26. It is expressly understood and agreed that this release and discharge is intended to cover and does cover all damages and losses of any kind sustained by Plaintiff VILLAGE OF LOMBARD that are not now known or anticipated but which may later develop or be discovered, including all the effects and consequences thereof.

7. The release and discharge set forth in Section 6 above shall apply with equal force to the past, present and future officers, directors, stockholders, officials, attorneys, agents, servants, representatives, employees, subsidiaries, affiliates, partners, predecessors, successors in interest, assigns, and all other persons, firms or corporations with whom ComEd and PATRICK have been, are now or may hereafter be affiliated.

8. ComEd and PATRICK mutually and reciprocally release and forever discharge each other and their respective agents, servants, successors and assigns, of and from any and all existing and potential claims which ComEd and PATRICK now have, or may have in the future, against each other or against the VILLAGE OF LOMBARD which in any way arise out of the Occurrence, the Lawsuit or the settlement thereof, including, but not limited to, claims for contribution under the Illinois Joint Tortfeasor Contribution Act (740 ILCS 100/1, et seq.) as well as claims for breach of contract, attorney's fees, indemnity and insurance coverage arising out of the Occurrence.

9. This Settlement Agreement and Mutual Release is limited to claims arising out of the Occurrence and Lawsuit filed by Plaintiff VILLAGE OF LOMBARD in Case No. 2010 L 26

and which is otherwise described in Plaintiff's Complaint at Law and all subsequent Complaints, Counterclaims and/or Third-Party Complaints in Case No. 2010 L 26.

10 It is understood and agreed that this Settlement Agreement and Mutual Release does not apply to any claims and causes of action that ComEd and PATRICK have against Old Republic Insurance Company for Old Republic's failure to provide a defense and indemnity to ComEd and/or PATRICK in the Lawsuit, including but not limited to those claims and causes of action asserted by ComEd and PATRICK in the Declaratory Judgment Action entitled *Patrick Engineering Inc., et. al. v. Old Republic Insurance Company*, filed in the Eighteenth Judicial Circuit, DuPage County, Illinois No. 2010 MR 001184. It is understood and agreed that ComEd and PATRICK retain all of their rights to recover attorneys fees, costs and indemnity against Old Republic Insurance Company, including but not limited to obtaining reimbursement for the attorneys fees and costs incurred by ComEd and PATRICK in the Lawsuit as well as obtaining reimbursement for the payments made by ComEd and PATRICK to the VILLAGE OF LOMBARD that are described in Section 5 above.

11. The Plaintiff VILLAGE OF LOMBARD and Defendants/Third Party Defendants ComEd and PATRICK acknowledge and agree that this Settlement Agreement and Mutual Release is a compromise of disputed claims and that the payments and other consideration provided are not to be construed as an admission of liability on the part of ComEd and PATRICK, by whom liability is expressly denied.

12. It is expressly understood and agreed that this Settlement Agreement and Mutual Release is a good faith settlement under the Illinois Joint Tortfeasor Contribution Act (740 ILCS 100/1, et. seq.) and is intended to cover all individuals and entities that could have been and/or

were sued in tort, contract, or other legal theory arising out of the Occurrence including, but not limited to, ComEd and PATRICK.

13. It is understood and agreed that pursuant to this Settlement Agreement and Mutual Release, the Lawsuit in Case No. 2010 L 26 is/will be dismissed with prejudice in its entirety, including all complaints, counterclaims, and third-party complaints. The Parties to this Settlement Agreement and Mutual Release agree to bear their own costs and attorney's fees whenever such fees and costs were incurred.

14. This Settlement Agreement and Mutual Release shall be construed and interpreted in accordance with the laws of the State of Illinois.

15. The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional action that may be necessary or appropriate to give full force and effect to the basic terms and intent of this Settlement Agreement and Mutual Release.

16. This Settlement Agreement and Mutual Release contains the entire agreement between the Parties and shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each. The terms of this Settlement Agreement and Mutual Release are contractual and not a mere recital.

17. This Settlement Agreement and Mutual Release may be executed in one or more counterparts each of which shall constitute one and the same agreement and may be executed by facsimile or other electronic signature, all of which shall be considered an original.



THE UNDERSIGNED HAVE READ THE FOREGOING SETTLEMENT AGREEMENT AND MUTUAL RELEASE AND FULLY UNDERSTANDS IT AND HAVE CONSULTED WITH HIS OR HER ATTORNEY REGARDING THE TERMS RECITED THEREIN.

Witness my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

VILLAGE OF LOMBARD

BY: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF ILLINOIS        )  
  ) SS.  
COUNTY OF DUPAGE        )

On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared an authorized signatory representative of the VILLAGE OF LOMBARD, to me known to be the person named herein who executed the foregoing Settlement Agreement and Mutual Release and acknowledged to me that VILLAGE OF LOMBARD voluntarily executed the same.

\_\_\_\_\_  
NOTARY PUBLIC

COMMONWEALTH EDISON COMPANY

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_

STATE OF ILLINOIS        )  
  ) SS.  
COUNTY OF DUPAGE        )

On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared an authorized signatory representative of COMMONWEALTH EDISON COMPANY to me known to be the person named herein who executed the foregoing Settlement Agreement and Mutual Release and acknowledged to me that COMMONWEALTH EDISON COMPANY voluntarily executed the same.

\_\_\_\_\_  
NOTARY PUBLIC

PATRICK ENGINEERING INC.

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_

STATE OF ILLINOIS        )  
  ) SS.  
COUNTY OF DUPAGE     )

On the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared an authorized signatory representative of PATRICK ENGINEERING INC. to me known to be the person named herein who executed the foregoing Settlement Agreement and Mutual Release and acknowledged to me that PATRICK ENGINEERING INC. voluntarily executed the same.

\_\_\_\_\_  
NOTARY PUBLIC