STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on May 16, 2013

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca
Gregg C. Sayre

CASE 11-M-0598 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR in Relation to Complaint Procedures- Appeal by Metro Eleven Hotels of the Informal Decision Rendered in Favor of Just Energy (100651 & 100649).

CASE 12-M-0113 - Complaint of Metro Eleven Hotels, LLC Regarding Alleged Slamming by Just Energy

ORDER RESOLVING SLAMMING ALLEGATION

(Issued and Effective May 21, 2013)

BY THE COMMISSION:

On February 2, 2010, a marketer on behalf of Just Energy, which is an Energy Services Company (ESCO), solicited an employee of Metro Eleven Hotels LLC (Metro 11) at the service address. On that date, the Metro 11 employee signed a document prepared by Just Energy entitled “Natural Gas and Electricity Price Protection Program (Customer Agreement)” (Agreement), which purports to commit Metro 11 to purchase the natural gas and electricity commodity used on the specified account from Just Energy for a five-year period at a specified price. Just Energy initiated a change in supplier for the specified account. Coincidentally, on February 10, 2010, ownership of the hotel at the service address transferred from Metro 11 to the current

owner, HHLP Duo One Associates LLC (HHLP).[1] On January 3, 2011, HHLP filed a complaint asserting that Just Energy "slammed" Metro 11/HHLP, *i.e.*, that Just Energy initiated the change in energy supplier without the customer's authorization. HHLP seeks to have this account rebilled by the ESCO to reflect what it would have been charged for its commodity usage on this account had it been a full-service electric and gas customer of Consolidated Edison Company of New York, Inc. (Con Edison), the distribution utility.[2] As explained below, we find that HHLP ratified the customer authorization provided by the employee who signed the Agreement. Accordingly, we will not require that the account be rebilled.

BACKGROUND

HHLP reports that it entered into a contract to purchase the property served by the account in question from Metro 11 on November 11, 2009. Under the purchase contract, according to HHLP, "all service contracts for the Inn, including the Inn's existing Con Edison utility contracts, in effect as of November 11, 2009 were assigned by Metro Eleven to Hersha [HHLP], and Metro Eleven was prohibited from entering into new long-term service contracts without Hersha's written consent." HHLP states that, as "a public company, Hersha had filed the Purchase Contract with the SEC and the impending sale was publicized in the business press." The sale closed, and HHLP became the owner of the property served by the account in question on February 10, 2010.

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[1] Neither Metro 11 nor HHLP informed Con Edison or the ESCO of the change in ownership before October 22, 2010.

[2] This is the remedy for slamming specified in the Uniform Business Practices (UBP), most recently revised by this Commission in June 2012. See, Case 98-M-1343, In the Matter of Retail Access Business Rules, Order Concerning Petitions for Rehearing or Clarification of Order Implementing Chapter 416 of the Laws of 2010 (issued June 15, 2012).

On February 2, 2010, an employee of Metro 11 signed the Agreement next to a statement in hand writing that the employee was "Assist Cheif Engineer [sic]." This was directly above the pre-printed statement "I have the authority to bind the Customer [Metro 11] to this Agreement." The agreement states, in hand writing that the customer is "Metro Eleven Hotels LLC" The agreement also includes a hand written billing address and two phone numbers. Per Con Edison, the billing address is the same as the service address. The space on the Agreement for the service address was left vacant. The Agreement also provides, the "product code," "term [period] and price" for both electricity and gas in separate sections in hand writing, and has a box checked off for the highest level of "GEOpower Units" for an additional charge. The Con Edison account number is hand written on the form.

In addition, on February 2, 2010, Just Energy conducted a "verification call" in which a Just Energy customer service representative spoke with the Metro 11 employee. Over the course of that phone call, the pertinent terms of the Agreement, including the name of the customer (Metro 11), the employee's name and position and that the employee "is the individual responsible for entering into and securing agreements such as the [Agreement]," were reiterated.

According to Con Edison, after it received an Electronic Data Interchange (EDI) enrollment transaction from Just Energy, Con Edison sent the customer letters notifying it of the pending enrollments for gas and electric service. Con Edison reports that it sent the letters to the service address on February 23, 2010 (regarding gas service), and on February 24, 2010 (regarding electric service). Just Energy reports that it provided HHLP with electric and gas service as of March 23, 2010 and April 1, 2010, respectively.

According to Just Energy, on October 22, 2010, it received notification from Affiliated Power Purchasers International (Affiliated) that Affiliated "would be handling the natural gas and electricity accounts going forward." Before this time, Con Edison sent, and HHLP paid, at least six invoices that included supply charges from Just Energy. Additionally, Just Energy states that at that time, and through its subsequent interactions with HHLP, Just Energy understood the account to "still be under the name 'Metro Eleven Hotels'."[3]

On November 3, 2010, HHLP began contacting Just Energy through email, letters and telephone calls. For example, on November 3, 2010, an email from Mr. Bart Mehta at HHLP states "[a]s I told you the contract you have for supplying the electricity and gas to this account was not signed by an authorized person of our company. So you do not have a valid contract. Please get back to me ASAP as we want to revert back to our original electricity supplier on the next meter reading date." HHLP states that it consistently held that position. The November 3, 2010 email from HHLP does also contain the following: "We owned 80 or so hotels in the USA and will be happy to speak with your sales people for possible future business. If you are interested in this, please contact me at any time. But first lets resolve this issue."

The information provided by the parties shows that Just Energy first sought to offer a new five-year agreement at a price lower than what it was then charging HHLP. Additionally, Just Energy asserted that it would seek an "exit fee," or early termination fee, if HHLP sought to have its gas and electricity provided by another supplier. While HHLP appeared to remain open to negotiating with Just Energy, HHLP consistently maintained that Just Energy did not have a customer agreement

[3] Email from Just Energy dated February 8, 2011.

signed by an authorized person from HHLP or the previous customer of the account in question, Metro 11.

In an email dated November 10, 2010, a representative of Just Energy states:

> We [Just Energy] have completed a thorough investigation into this account ...; we have listened to the recorded calls and everything was done by the book. Just Energy has completed our due diligence in making sure the signatory had the authority to bind the company; we asked all the appropriate questions in the re-affirmation call. From our point of view, it is the signatory that Metro 11 hotels has the issue with. If he is not legally allowed to enter into agreements on behalf of Metro 11 hotels, this is an employee issue, not an issue of Just Energy's.

That email continues with a reiteration that if HHLP ceases to be served by Just Energy, then Just Energy would seek an exit fee in the amount of $238,499.68. This is consistent with the faxed letter from Just Energy dated November 18, 2010, in which the company's legal counsel states that, "in a recorded reaffirmation call," Metro 11's employee "provided Just Energy with your client's business information including the utility account number and clearly confirmed his intention to enroll your client on Just Energy's five year fixed price program. If Mr. Barr did not have actual authority, which we claim he did, he at least had apparent authority to enter into the Contract."

In a faxed letter dated December 2, 2010, Just Energy's legal counsel stated that "[a]s a customer service gesture, we have agreed to cancel the Contract between Just Energy and Metro dated February 2, 2010 in connection with the above-noted accounts and agree to waive the termination fees provided you are willing to sign a mutual Release and Confidentiality Agreement." HHLP asserts that because it refused to waive refund claims against Just Energy, it refused to sign the requested Release and Confidentiality Agreement.

Instead, HHLP filed a complaint with our Office of Consumer Services on January 3, 2011, alleging that Just Energy engaged in "slamming" in contravention of UBP Section 5.K.1 when it enrolled HHLP's account. Additionally, HHLP explains that it began "withholding payment for outstanding invoices in order to recoup the overpayments to Just Energy."[4]

HHLP withheld a portion of its payments to Con Edison, which HHLP asserts reflects the amount it was charged by Just Energy in excess of what it would have paid, had it remained a full-service customer of Con Edison. As of May 13, 2011, Staff has had the utility hold $82,518 in dispute, meaning that the utility may not terminate service for HHLP's failure to pay that amount. Con Edison reports that, because of the operation of its Purchase of Receivables (POR) program, when it billed HHLP for the charges imposed by Just Energy, it simultaneously purchased the receivables represented by those charges from Just Energy. Accordingly, Just Energy has been paid the amount disputed by HHLP. It is Con Edison that has not been paid that amount.[5]

The account ceased to be served by Just Energy as of December 31, 2010, for gas, and January 19, 2011, for electricity. Also, as of January 19, 2011, Just Energy ceased seeking the exit fees it claimed it could have sought for early termination of the Agreement. Accordingly, our determination of whether slamming occurred will determine whether HHLP or Just Energy is responsible for paying Con Edison the amount HHLP has withheld based on this dispute and the associated late payment charges.

[4] HHLP letter dated September 22, 2011.

[5] Con Edison letter of May 4, 2012.

PROCEDURAL HISTORY

On January 3, 2010, HHLP filed a complaint with the Department's Office of Consumer Services, alleging that Just Energy had slammed HHLP by enrolling it's account for the subject property for gas and electric commodity supply without proper authorization. By letter dated May 6, 2011, OCS informed HHLP of its initial decision that slamming had not occurred. Following an additional telephone call from HHLP asserting that the person who signed the Agreement had been a janitor who was not authorized to sign the Agreement, OCS asked Just Energy to "rerate the billing to Con Edison rates – not ESCO rates and apply credit accordingly." By letter dated September 8, 2011, OCS informed the parties, that based on further review of the case, it was upholding its original initial decision that slamming had not occurred.

On September 22, 2011, HHLP requested an informal hearing. By letter dated October 21, 2011, OCS informed the parties that the request for an informal hearing was denied. The letter explained that this was because an informal hearing officer lacked the power to decide the issues in the complaint. On November 1, 2011, HHLP submitted an appeal of the decision denying it an informal hearing.

On April 3, 2012, the Secretary to the Commission issued a Notice of New Proceeding and Comment Process (Notice). In the Notice, the Secretary observed that:

> Notwithstanding HHLP's attempt to obtain an informal hearing through Part 12, the denial of that request, and the pendency of HHLP's appeal of that denial, the Commission may, after a review of the record before it, determine that HHLP's slamming complaint, and a review of the OCS conclusion that slamming did not occur, is best addressed through a new proceeding. Accordingly, a new proceeding, Case 12-M-0113 has been created in which to consider the merits of HHLP's complaint that Just Energy engaged in

> slamming in enrolling the account in question and the OCS conclusion that slamming did not occur.

Further, the Notice announced that the parties and record in Case 11-M-0598 would be incorporated into the record of Case 12-M-0113 and invited the parties to submit comments. The parties were asked to address three issues:

> (1) whether Just Energy's enrollment of the account in question was authorized; (2) if Just Energy's enrollment was not authorized, what remedy (e.g. rebilling) is warranted and in what amount, with supporting documentation; and (3) other information the parties believe will assist the Commission in understanding the facts and issues in this case.

The Notice called for initial comments to be submitted by May 4, 2012 and reply comments to be submitted by May 21, 2012. Additionally, in compliance with the State Administrative Procedures Act §202(1), a notice was published in the State Register under Case 12-M-0113 on April 4, 2012. The comment period expired on May 21, 2012. HHLP, Just Energy, and Con Edison submitted initial comments on May 4, 2012. HHLP also submitted reply comments on May 21, 2012 and supplemental information on May 31, 2012.

POSITIONS OF THE PARTIES

HHLP

HHLP asserts that, for Just Energy to show that it had authorization for the change in supplier for HHLP's gas and electric account, Just Energy would have to show that the employee who signed the Agreement had either actual or apparent authority to enter into the agreement on behalf of HHLP. HHLP asserts that the employee who signed the Agreement did not have actual authority. In support of this assertion, HHLP provides a copies of the employee's job application and the job description for the employee's position. HHLP explains that the employee "was that of a low-level custodian performing tasks such as

assisting in ‘replacing ceiling tiles, light bulbs, patching vinyl, etc.’ without any contractual or procurement related responsibilities.”

HHLP also denies that the employee who signed the Agreement had apparent authority to do so. HHLP states that no words or acts of Metro 11 provided its employee with apparent authority to sign the Agreement. HHLP provides an affidavit of Michael Payne, who, according to HHLP has negotiated several hundred energy supply contracts on behalf of large users. According to Mr. Payne, such contracts must generally be approved by the owner of the company, or officers at the level of CEO or CFO. Mr. Payne states that he has never seen an “assistant building superintendent” execute a contract such as this, and any “reasonable supplier would be highly skeptical of an Agreement executed by an assistant building superintendent.

HHLP asserts that the property served by the account in question was under a contract for sale at the time the Agreement was signed. HHLP explains that as a public company, it had to file the purchase contract for the property with the SEC, and that the impending sale was publicized in the business press. HHLP provides printouts showing this information available on the internet. HHLP argues that, “[a]ny reasonable due diligence inquiry on Just Energy’s part would have disclosed the impending sale of the Inn, as well as the terms of the Purchase Contract, and called the legitimacy of the Protection Agreement into question.”

HHLP cites Edinburg Volunteer Fire Co., Inc. v. Danko Emergency Equip., 55 A.D.3d 1108 (3rd Dep’t 2008), which states that “[a]pparent authority will only be found where the words or conduct of the principal – not the agent – are communicated to a third party, which give rise to a reasonable belief and appearance that the agent possesses authority to enter into the

specific transaction at issue." Additionally, states HHLP, Edinburg Volunteer Fire Co. explains that [a]n 'agent cannot by his own acts imbue himself with the apparent authority' to act for the principal." Further, according HHLP, Edinburg Volunteer Fire Co. explains that "[p]arties dealing with an agent do so at their own peril and must make the necessary effort to discover the true scope of the agent's authority."

Additionally, HHLP asserts that the fact that it paid "six or seven invoices before lodging a complaint" should not be held against it. HHLP argues that these invoices were paid "during the transition period between the closing on the hotel sale and Hersha's assumption of full management of the hotels." Moreover, HHLP claims, Just Energy's name does not appear on these bills until the fourth page.

As a remedy, HHLP seeks to have its account with Con Edison rebilled to reflect what HHLP would have paid on the account had Just Energy not been its supplier. That re-rate would decrease the amount due on the account by $82,518, or the difference between what Just Energy charged for supply and what the full-service Con Edison rate would have been. HHLP also asks that Just Energy be ordered to pay HHLP's reasonable attorney's fees.

Just Energy

In its May 4, 2012 comments, Just Energy asserts that its enrollment of the account in question was authorized. Just Energy states that Metro 11, through its employee, entered a contract with Just Energy for the supply of natural gas and electricity for the account in question. As proof of this authorization, Just Energy states that the employee "provided the Customer Signature for the Contract in three places including (1) with the title Assistant Chief Engineer above the statement 'I have the authority to bind the Customer to this

Agreement'; (2) as authorization for the price and term for natural gas service; and (3) as authorization for the price and term for electricity service." Just Energy also states that "[t]he authorized enrollment of Metro Eleven is further evidenced by the verification call of February 2, 2010 involving" the same employee of Metro 11. Just Energy has provided an audio file of that call and relies on the statement of the Metro 11 employee in that phone call that, *inter alia*, "[c]onfirmed that he is the individual responsible for entering into and securing agreements such as the Contract".

In prior submissions, Just Energy asserted that HHLP made no contact with Just Energy for more than seven months after Just Energy became the supplier of the account in question. Additionally, according to Just Energy, when a representative did make contact with Just Energy, that representative sought to negotiate lower electricity and natural gas rates for the account in question and "mentioned that Hersha Hospitality Management has other properties that they may consider switching to Just Energy."

Con Edison

Con Edison states that, because the HHLP's claim concerns only commodity rates, it is not taking a position on the merits of the slamming allegation. Con Edison does explain that, due to the operation of its Purchase of Receivables (POR) program, when Con Edison billed HHLP for the commodity provided by Just Energy, Con Edison simultaneously purchased Just Energy's receivables. Thus, although HHLP intended to withhold payment from Just Energy, Just Energy received payment for the charges it imposed on HHLP. Accordingly, Con Edison recommends that, if this Commission finds that Just Energy "slammed" HHLP, that the appropriate remedy would be for Just Energy to make a

refund directly to HHLP, "and all disputed amounts should be paid to Con Edison in order to make the Company whole."

DISCUSSION AND CONCLUSION

Denial of HHLP's Request for an Informal Hearing

In Case 11-M-0598, HHLP appealed the denial by OCS of its request for an informal hearing under 16 NYCRR Part 12. However, the denial of the request was appropriate. As explained in the letter from OCS dated October 21, 2011, an informal hearing in HHLP's case was inappropriate because an informal hearing officer lacked the power to decide the issues in the complaint. This is because 16 NYCRR Parts 12 and 13 do not provide for non-residential customers to utilize our consumer complaint procedures to resolve disputes with ESCOs.[6] Contrary to the October 21, 2011 letter denying an informal hearing, there is no exception for complaints of nonresidential energy customers that they were slammed by an ESCO.[7] The resolution of such disputes is governed by the provisions of the contract between the non-residential customer and the ESCO. Accordingly, we modify the OCS decision denying HHLP an informal hearing and dismiss HHLP's appeal of that decision.

However, as explained in the Notice, our review of HHLP's underlying slamming complaint against Just Energy is best

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[6] See Case 08-G-0872, Appeal by Port Washington Water District of the Informal Decision Rendered in Favor of Econnergy Energy Company, Commission Determination (issued September 19, 2008).

[7] The Department and this Commission remain committed to reviewing and resolving non-residential customer allegations of slamming. OCS, as the office within the Department with personnel and facilities suited to receiving complaints, will continue to receive and keep records of such complaints. When customers allege slamming, OCS will refer such complaints to other staff who will review the allegations outside of the Part 12 Consumer Complaint Procedures. Where appropriate, staff may bring slamming allegations made by nonresidential customers to us for resolution.

accomplished through a separate proceeding, Case 12-M-0113, outside of our consumer complaint procedures. We address the merits of HHLP's slamming complaint below.

The Slamming Allegation

HHLP alleges that Just Energy "slammed" HHLP. Section One of the UBP defines slamming as the "[e]nrollment of a customer by an ESCO without authorization." UBP §5.K provides further information, stating in subsection one that, "[a] change of a customer to another energy provider without the customer's authorization, commonly known as slamming, is not permitted." UBP §5.K.2 explains that an ESCO that engages in slamming must provide a refund to the customer of the difference between the charges of the slamming ESCO and the charges that would have been imposed by the customer's incumbent provider. UBP §5.K.3 requires ESCOs to "retain for two years or for the length of the sales agreement, whichever is longer, documentation of a customer's authorization to change providers." That documentation must comply with the requirements described in the attachments to Section 5 of the UBP. Pertinently, Attachment 3 to Section 5 identifies the "Written Agreements and Authorization Requirements." Of importance to this case, that written authorization must include "[a] customer signature and date."

In this case, there is a written agreement, signed by an employee of Metro 11, the account holder at the time the written agreement was executed. However, there is a dispute as to whether that signature constitutes the "customer's authorization to change providers" as required by the UBP.

In their submissions, HHLP and Just Energy discuss whether or not the Agreement, is valid as a contract. However, this is not the relevant question. In reviewing this matter, we

are not construing a contract.[8] Rather, we are deciding whether or not Just Energy complied with the UBP, i.e., whether or not Just Energy had customer authorization to change the provider on the account in question.

The parties also refer to the concepts of actual and apparent authority, regarding whether or not the Metro 11 employee had actual or apparent authority to provide customer authorization on behalf of Metro 11/HHLP for a change in energy supplier. However, whether or not the employee of Metro 11/HHLP had actual or apparent authority to provide a customer authorization on behalf of Metro 11/HHLP to switch energy suppliers is not determinative in this case.[9]

Instead, we look to the actions of HHLP after the Agreement was signed. HHLP's actions, both active – it paid its monthly bill, including charges for service provided by Just Energy, for at least six months – and inactive – it did not voice any objection after receiving letters notifying it that its gas and electricity supplier had been switched to Just Energy, show that HHLP had ratified the customer authorization provided by the Metro 11/HHLP employee on February 2, 2010.

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[8] The parties may have other remedies based in contract law that are not addressed in this decision, and are not properly the subject of a Commission proceeding.

[9] With regard to the issue of apparent authority, Just Energy appears to rely solely on the statements, both written and oral, of the Metro 11 employee who signed the Agreement to show that the employee had the apparent authority to provide the customer authorization on behalf of Metro 11/HHLP. However, Just Energy, and other ESCOs, should be aware that, in a case alleging slamming, if the determination turns on whether or not the signatory to an agreement has apparent authority to provide the customer authorization required by the UBP, the signatory's statements alone will not support a finding that the ESCO obtained customer authorization for a switch.

Ratification is a common law doctrine concerning agency. It applies "when an agent acts outside the scope of his or her actual authority, but the agent's acts are later ratified by the principal and therefore attributable to the principal."[10] Pertinent to this case, in order for ratification to occur, the principal must have knowledge of the material facts and intend to ratify the agent's actions.

In this case, HHLP had knowledge of the material facts. Con Edison sent letters to HHLP at the account's service address, which was also the billing address, notifying HHLP that its energy supplier had been switched to Just Energy. These letters were sent on February 23, 2010, and February 24, 2010, regarding gas and electric service, respectively. Additionally, once Just Energy actually began to provide HHLP's energy supply, on March 23, 2010, and April 1, 2010, for electric and gas service, respectively, Con Edison sent and HHLP paid at least six monthly bills.

HHLP asserts that Just Energy's name does not appear until the fourth and final page of the monthly bills. However, HHLP ignores the fact that these bills refer to "ESCO electricity supply charges" and "ESCO gas supply charges" on the first page of the bill. HHLP similarly ignores the statement on the second page, under the heading "Your supply Charges," that its electricity is supplied by Just Energy, with "Just Energy" in all capital letters. An identical statement appears on the third page, regarding gas supply. Finally, on the fourth page, the bill refers solely to the supply charges from Just Energy. The bill provides the material information regarding the gas and electricity supply agreements, namely the name and contact information for the supplier, as well as the per kWh and per therm commodity charge and the charge for the month. Thus, HHLP

[10] New York Jur. 2d, Agency, §181.

had knowledge of the material facts regarding the identity of its energy supplier and the terms pursuant to which its energy was supplied.

HHLP must also have manifested an intention to ratify the action of its employee. Such intention can, of course, be explicit, however it need not be. As in this case, an intention to ratify the actions of an agent exists when such intention can be inferred from the principal's actions and failures to act.[11] We infer HHLP's ratification of its employee's authorization to switch the energy supplier for HHLP's utility account primarily from HHLP's affirmative action in paying its bill, including the Just Energy charges on a monthly basis for at least six months.

As explained above, the utility bill sent to HHLP specifically stated that its energy supplier was Just Energy and the costs of that supply. For six months, HHLP paid these bills without objection. HHLP suggests that that this should not be held against it because these "six or seven invoices" were paid during the transition between the closing on the hotel sale and Hersha's assumption of full management of the hotels." However, we are not persuaded that the payment by a nonresidential customer with many resources of at least six invoices, occurring

[11] See, New York Jur. 2d, Agency, §191; Indosuez International Finance B.V. v. National Reserve Bank, 98 N.Y.2d 238, 246 (2002)("NRB ratified the confirmation contracts as it failed to raise the issue of authority in the course of performance [accepting payment into its account, without objection, for six of 14 transactions, which it later asserted were entered into by an agent without authority] … ."); Mulitex USA, Inc. v. Marvin Knitting Mills, Inc., 784 N.Y.S.2d 506, 507 (N.Y. App. Div. 1st Dep't. 2004)(The principal ratified the actions of its agent because "[t]hat principal had the option to repudiate the sales confirmations or object to the invoices addressed to MKM, but he declined to do so." And that "[t]he partial payment of those invoices constitutes ratification of the agreements made by Cottler and Lieberman on MKM's behalf.).

over the course of six months, should be set aside because the hotel changed owners two months before the first bill in question.

Additionally, as we noted above, Con Edison sent two letters to the address on file with Con Edison as the account's billing and service address.[12] These letters notified HHLP that its electricity and gas supplier would be switched to Just Energy. Each letter ended with a statement telling the customer that if it "did not agree to be enrolled" with the ESCO, or now wished "to cancel [its] enrollment," the customer "must notify us" and the ESCO immediately.

The UBP requires that the utility send these letters as a protection for customers against slamming. The purpose is for slammed customers to call the utility when they receive one of these letters. As explained above, the intention to ratify an agent's actions can be found when the principal fails to respond when notified of an agent's actions. Accordingly, HHLP's silence after having received these letters is an indication that it intended to ratify the customer authorization to switch energy suppliers.

Moreover, utility customers have a responsibility to pay attention to utility communications. For example, the Commission has repeatedly held that utility notification, through letters or brochures, to customers of the need to inform the utility if they meet specified criteria for transfer to a potentially beneficial rate properly limits a customer to prospective billing at a desired rate. Because the customer was notified that it had to request the rate, the utility is not

[12] This is the same address to which Con Edison sent the bills that HHLP subsequently paid.

reqired to treat the belated request for the rate as if it had been made earlier.[13]

In this case, HHLP was put on notice by Con Edison's February 2010 letters that the utility had received a request to change the electricity and gas supplier for the specified account to Just Energy, and that HHLP should contact the utility and the ESCO if HHLP had not made those requests or wished to cancel them.[14] It is not necessary here to infer ratification solely from the receipt of such letters and a customer's failure to respond with an objection. HHLP's failure to respond to the February 2010 letters, combined with its subsequent payment of at least six monthly utility bills including supply charges from Just Energy without objection, fully support our inference of an intention to ratify the employee's actions.

We have carefully considered all information provided by the parties, including that contained in the OCS complaint file, that provided in Case 11-M-0598, and that provided in response to the Secretary's notice at the institution of this Case. We find that, as a result of HHLP's ratification of the customer authorization for the switch in energy suppliers

[13] See, e.g., Case 95-E-0773, Appeal by George Brocious of the Informal Decision in Favor of RG&E, Commission Determination (issued August 27, 1999); Case 02-G-0225, Appeal by NYSEG of the Informal Decision in Favor of Mr. Albert Silverman, Commission Determination (issued October 25, 2002); Case 02-E-1160, Appeal by Mr. John Iannuzzi of the Informal Decision in Favor of Con Edison, Commission Determination (issued May 23, 2003); Case 06-E-1292, Appeal by Plaza Auto Mall of the Informal Decision in Favor of Con Edison, Commission Determination (issued April 19, 2010); and Case 07-E-0598, Appeal by Phipps Houses Services of the Informal Decision in Favor of Con Edison, Commission Determination (issued August 20, 2012).

[14] In addition and as explained above, HHLP was repeatedly notified of its receipt of ESCO supply by subsequent monthly utility bills.

provided by its employee, Just Energy did not slam HHLP. Accordingly, the relief sought by HHLP is denied.

The Commission orders:

1. The decision denying HHLP an informal hearing is modified and upheld; and HHLP's appeal is denied.

2. Just Energy had the customer's authorization to change HHLP's energy supplier; and the rebilling and other relief requested by HHLP is denied.

3. Cases 11-M-0598 and 12-M-0113 are closed.

By the Commission,

(SIGNED) JEFFREY C. COHEN
Acting Secretary