

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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August 1, 2010

Mr. William J. Gilberti, Jr.
Mr. Martin A. Lynn
Gilberti, Stinziano, Heintz & Smith, P. C.
Attorneys and Counselors At Law
555 East Genesee Street
Syracuse, NY 13202-2159

Ms. Nancy Fiaccone
National Grid
300 Erie Boulevard, West
Syracuse, NY 13207

Subject: Informal Hearing Decision
Case #929390
National Grid Account Number: 41790-51046
Loon Creek Properties, LLC
601 East Genesee Street
Syracuse, New York 13202

Dear Messers Gilberti and Lynn and Ms. Fiaccone:

An informal hearing concerning the above case was held on June 1, 2010 in Hearing Room A of the Syracuse State Office Building. Messers William Gilberti and Martin Lynn, representing the complainant/customer, Loon Creek Properties, LLC (Loon Creek), participated in the informal hearing. Ms. Nancy Fiaccone represented National Grid. Based on a thorough examination of all the information presented, I uphold Staff's decision regarding Loon Creek's responsibility for gas service registered by the gas meter at the premises; however, I must modify Staff's determination of the length of the backbilling period which will result in a downward adjustment to the original amount billed.

Complainant's Position

Mr. Gilberti contacted the Office of Consumer Services (OCS) on September 16, 2009, disputing charges of \$25,568.44 for gas service for the period of August 2, 2007 to June 25, 2009. The customer contests this charge as he states Loon Creek Properties, LLC (Loon Creek) should not be held responsible for historical service that was never requested.

Mr. Lynn responding for Loon Creek provided the following regarding Account #41790-51046:

On or about August 2, 2007, the prior owner of the property requested termination of natural gas service at the premises (601 East Genesee Street). On or about August 2, 2007, Loon Creek purchased the property in a foreclosure sale. Shortly thereafter, Loon Creek requested and obtained electricity for the property from National Grid. At no time did Loon Creek request any natural gas service from National Grid. Loon Creek, after acquiring electrical service, timely paid each and every monthly invoice received from National Grid.

On or about June 8, 2009, National Grid (by retaining a company named Utility Access Solutions) filed and served a Summons and Complaint against Loon Creek relating to natural gas service at the property. Loon Creek disputed the merits of this lawsuit which National Grid eventually discontinued by filing a Stipulation of Discontinuance, dated July 8, 2009. As part of the resolution of the lawsuit, Loon Creek agreed to, and did, contact National Grid to set up gas service for the property.

On or about July 8, 2009, National Grid invoiced Loon Creek in the amount of \$3,250.40 for natural gas charges for usage between August 2, 2007 and December 26, 2007. On or about July 10, 2009, National Grid invoiced Loon Creek in the amount of \$8,411.71 for natural gas charges for usage between December 26, 2007 and April 23, 2008. On or about July 13, 2009, National Grid invoiced Loon Creek in the amount of \$134.00 for natural gas charges for usage between April 23, 2008 and October 23, 2008. On or about July 14, 2009, National Grid invoiced Loon Creek in the amount of \$13,690.90 for usage between for October 23, 2008 and April 27, 2009. On or about July 15, 2009, National Grid invoiced Loon Creek in the amount of \$81.27 for natural gas charges for usage between April 27, 2009 and June 25, 2009. Loon Creek disputed responsibility for the invoices received in July 2009.

On or about August 5, 2009, Loon Creek sent a letter to National Grid by Certified Mail, denying responsibility for the Backbills and demanding that National Grid rescind the charges. In or about September of 2009, Complainant contacted the Office of Consumer Services regarding the Backbills and National Grid's threat to discontinue service if the Backbills were not paid. The Office of Consumer Services thereupon opened this proceeding, entitled "Complaint No. 929390," relating to the Backbills.

On or about September 28, 2009, while the parties were in the dispute over the responsibility for the Backbills, National Grid served a "Final Disconnect Notice" on Loon Creek demanding payment in the amount of \$819.49 as the total outstanding balance.

On or about October 5, 2009, Loon Creek tendered payment in full of the outstanding amount owed and in full satisfaction of all outstanding amounts in dispute under the Complaint File Number 929390 ("Settlement Check").

Complainant contends that it is well settled that if, during an honest dispute as to payment or amount owed, a party accepts and cashes a check marked settlement in full satisfaction (or similar language), the matter is settled for the amount of the check as an accord and satisfaction. The Settlement Check tendered by Loon Creek clearly states, "Settlement in Full Satisfaction of all outstanding amts Case # 929390," on the face of the check. Thus, the Complaint and the Backbilling matter were resolved by accord and satisfaction when National Grid accepted and cashed the Settlement Check from Loon Creek.

Furthermore, when a utility company, such as National Grid, attempts to backbill for services, certain statutory and regulatory requirements govern. Failure to comply with the backbilling requirements renders those bills null and void. National Grid failed to comply with mandated backbilling procedures pursuant to Public Service Law § 66 and 16NYCRR. §13.9. The Backbill was provided with no explanation of the error or circumstances that caused the Backbilling. National Grid's failure to comply with the statutory requirements relating to backbilling requires that Staff find that there is no responsibility for the disputed Backbilling from July 2009 relating to the Complaint.

Lastly, National Grid may not backbill Loon Creek for two years worth of gas services that Loon Creek never requested and did not knowingly receive, especially here, where it is undisputed that: (1) the prior owner requested termination of gas service; (2) National Grid failed to terminate such service at the property; (3) National Grid provided electrical service to the property upon Loon Creek's request; and (4) National Grid thus had actual notice that Loon Creek's ownership of the building and proper billing address as early as August 2007. Loon Creek requests a determination that it has no responsibility for any backbills or any other outstanding amounts relating to natural gas usage at the property and for any other determination that may be just and proper.

Utility's Position

The utility's position was received in this format on June 1, 2010 and is provided verbatim.

Customer Issue: Responsible Bill—amount in dispute \$ 25,568.44 for Account # 41790-51046

Loon Creek, LLC is disputing responsibility for gas charges totaling \$ 25,568.44 for gas service from August 2, 2007 – July 25, 2009 at 601 E. Genesee Street, Syracuse, NY 13202.

Company Position: The Company's position remains that the customer's account billing for the gas service at the above address is correct and the customer is responsible for all charges as billed.

Pertinent Information: Loon Creek, LLC, submitted a commercial application for service at 601 E. Genesee St. in Syracuse, NY on August 6, 2007. A deposit of \$5,600.00 was assessed to the pending account # 41590-51139. To avoid paying the deposit the customer changed the name on the account to Devorsetz, Stinziano and Gilberti, PC. As there were established accounts in good standing under this name, the deposit was refunded. Account # 41590-51148 was opened under Devorsetz, Stinziano and Gilberti, PC on August 14, 2007. The account remained under this name until June 29, 2009 when the name on the account was changed to Loon Creek Properties, LLC. Account #41590-51157 was opened at this time. Upon initial application the customer submitted a Mortgage and Security Agreement showing proof of ownership as of August 1, 2007. The electric service was put into the customer's name on August 14, 2007 as the application requested.

From August 2, 2007, the date the last account holder at this address terminated service, through the October 24, 2007 meter reading, zero usage was recorded on the gas meter. Beginning with the November 26, 2007 meter reading, the gas meter began to use a significant amount of service. National Grid attempted several times to gain access to shut off the gas meter once usage was noted on the meter. Letters were sent requesting that the occupant contact National Grid and establish gas service. The customer did not respond to requests to gain access to shut off the meter or to apply for service. As a result, Replevin action was initiated to gain access to the gas meter. The initial request to provide access received no response. A Summons was obtained on June 24, 2009 to gain access to the building to remove the gas meter. Replevin action was discontinued when Loon Creek, LLC contacted National Grid and agreed to connect the gas service into its name. As National Grid was in possession of business papers proving that Loon Creek, LLC owned the property as of August 1, 2007 and received a fax on July 2, 2009 requesting gas service be connected as of August 2, 2007, account #41790-51046 was opened and the customer was back billed for the gas service used during the period of August 2, 2007 – June 25, 2009. The backbill was for 20,511 CCF's of gas totaling \$25,568.44.

Company Summary: Loon Creek, LLC was back billed in accordance with PSC Regulations for Non-Residential Customers 16NYCRR Part 13.9 (a-e) Backbilling. As Loon Creek, LLC. was the owner of the property as of August 1, 2007 and requested the gas service on as of August 1, 2007 once Replevin action was initiated, National Grid finds the customer is responsible for the gas charges as billed.

Analysis

The issues to be addressed by this determination are:

- 1) Can Loon Creek's claim of payment in full by "accord and satisfaction" be considered? If so, does it apply to this matter?
- 2) Did National Grid act in accordance to established notification policy or regulations when attempting to resolve the gas usage at Loon Creek's property?

- 3) Did National Grid calculate and apply the backbilled charges in accordance with approved tariff language and/or Public Service Law regulations?
- 4) Is Loon Creek ultimately responsible for any or all of the backbilled charges?

CUSTOMER CLAIM OF AN ACCORD AND SATISFACTION

Issue 1 can be addressed by first defining Accord and Satisfaction:

Accord and Satisfaction: *Payment of money or other valuable consideration (usually less than the amount owed) in exchange for extinguishment of a debt. There must be an express or implied agreement that accepting the smaller sum discharges the obligation to pay the larger sum.*¹

Once the term is defined, based on that definition, it can be determined that Loon Creek's claim that by tendering its check for \$819.49 with the printed statement. **"Settlement in Full Satisfaction of all outstanding amts"** in the memo line cannot be accepted as meeting the criteria of accord and satisfaction as defined above.

While there was a dispute regarding amounts owed between the customer and company, there is no evidence of the "express or implied agreement" that the acceptance of the proffered check discharged the obligation to pay the larger (or full) amount. This being the case, I must reject Loon Creek's claim that an accord and satisfaction existed that rendered all additional charges or amounts in the dispute null and void.

Also, a previous Commission complaint determination² extensively addressed this issue, and observed:

"To permit utility customers to effectuate unilateral adjustments to their bills by rendering partial payments with endorsements indicating they constitute payment in full would undermine the entire legislative scheme for the establishment of fair and reasonable rates. Many customers honestly believe they are overcharged, but investigation proves their beliefs to be in error. Such customers should not have the option of deciding for themselves how much is fair and reasonable. It is also noteworthy that, as a practical matter, utilities simply cannot, except at great expense, which would be borne by the ratepayers, screen all

¹ "Accord and satisfaction." West's Encyclopedia of American Law. The Gale Group, Inc, 1998.

² Case 92-C-0410 - Appeal by Robert Cooper of the Informal Decision Rendered in Favor of New York Telephone Company, Determination, issued October 4, 1993. (The Commission's determination is available on its website, www.dps.state.ny.us)

payments, so as to place their own endorsement on such checks indicating that their rights to further payment are reserved.”

Thus the Commission concluded that while this earlier complainant’s “actions might be adequate to effect an accord and satisfaction in the context of some other type of contractual relationship, it will not suffice when the creditor is a public utility and the charges are for tariffed utility service.”

INACTIVE METER WITH USE NOTIFICATION

I researched Loon Creek and National Grid’s dispute regarding whether the company notified the customer properly when sending occupant letters to the service address upon discovery of the inactive gas meter recording usage.

National Grid has stated that its policy for notification for a meter that registers usage without a customer of record is to send correspondence to the service address of the meter addressed to “Occupant”, advising of the need to contact the company to provide access to the meter and possibly apply for service on the meter.

There is no tariff language or Public Service Law regulation that I have found that provides for mailing notification to any additional address. As the company was sending the notices to the service address in the name “Occupant”, another address would not have been on file or obtainable. I must agree with the company’s explanation that as the service address was a commercial property, the company would not initially connect the gas usage with the electric account in Loon Creek’s name, hence the notification letters to “Occupant”.

While National Grid could have reviewed the account and possibly noted the electric account and made a plausible connection/conclusion that the gas service was being used by Loon Creek, it did not, and I have found no tariff language or regulation that indicates the company’s requirement to do so.

I must determine that the company’s notification(s) regarding the inactive service was in accordance with accepted utility policy and therefore, appropriate.

CALCULATION OF BACKBILLING CHARGES

In regard to the calculation of the backbilling charges, National Grid records indicate that the charges that were billed to Loon Creek were based on actual readings for the period of August 2, 2007 to June 25, 2009. The total amount of the backbilling, \$25,568.44, being based on actual recorded usage provided by an accurately operating remote reading device, has been calculated correctly.

LIMITATION OR WAIVER OF THE BACKBILLING CHARGES

In regard to the limitation or waiver of the backbilled charges, National Grid could not properly bill the service to any responsible customer until access to the gas meter could

be obtained. As access was not provided by the customer until June 25, 2009, in response to possible replevin action, and was billed within six months from that date, and the period of the backbill (August 2, 2007 to June 25, 2009) was less than 24 months, in accordance with Tariff language, no limitations would normally be imposed.

However, my review of National Grid's records do not find the required backbilling notification letter in accordance with National Grid's PSC No. 219 Gas Tariff, Leaf 84, Section 15.9.1.1, ***"Every backbill shall contain a written explanation of the reason for the backbill that shall be sufficiently detailed to apprise the customer of the circumstances, error or condition that caused the underbilling..."***

As no letter was sent to Loon Creek as required by National Grid's Tariff regulations, I must apply the stipulation required by Section 15.9.3.1 "Limitations on Backbilling Period, " ***"When the failure to bill at an earlier time was due to utility deficiency, the Company shall not bill a customer for service rendered more than 12 months before the Company actually became aware of the circumstance, error, or condition that caused the underbilling..."***

As the company did not provide the required notification letter with or concurrent to, the backbilling charges sent to Loon Creek, this constitutes a utility deficiency (error) that entitles the customer to a limitation of the backbilling to 12 months.

There is the issue of whether Loon Creek was aware, or reasonably should have been aware of the gas service being used at the premises. While I agree with National Grid's position that as gas service was being used in a significant volume during two winter heating seasons and someone from Loon Creek must have been at the premises at some time during those two winter periods and found the premises being heated, I cannot definitively place a time on when Loon Creek would have become aware of the usage. As I have already determined that Loon Creek is responsible for 12 months of the service, I believe that National Grid's notification error, and the plausible culpability of Loon Creek at some time during the backbilling period makes the limitation of the backbilling to 12 months both a required and reasonable determination of the application and responsibility for the backbilled charges. This would take into account that, if Loon Creek had been billed in a normal fashion, conservation action could have been taken and other options such as an Energy Service Company could have been considered, reducing the total amount of billed charges during the disputed period.

National Grid is instructed to recalculate the backbilling charges to reflect the 12 month period of June 25, 2008 to June 25, 2009, notifying me within fifteen (15) from the date of this decision that the instructed adjustment to Loon Creek's account has been performed.

National Grid will also offer the complainant a deferred payment agreement in accordance with the regulations for non-residential accounts (16 NYCRR 13.5) within 15 days of the date of this decision.

If either party disagrees with this decision, an appeal may be filed with the Commission. The appeal procedures are set forth below.

APPEAL PROCEDURE

If you believe that this decision is incorrect, you may appeal to the Commission. The basis for an appeal to the Commission is limited to one or more of the following grounds:

- (1) The hearing officer made a mistake in the facts in the case or in the laws or regulations which affected his or her decision; or
- (2) The hearing officer did not consider evidence presented at the hearing or review, which resulted in an unfavorable decision; or
- (3) New facts or evidence, not available at the time of the hearing, have become available, and could affect the decision on the complaint.

If you choose to appeal, your appeal must be in writing and must contain an explanation of the facts or conclusions in the decision with which you disagree, the reasons for your disagreement, the relief or remedy sought from the Commission, and documentation of your position or legal arguments supporting your position.

The appeal should be filed within fifteen (15) days after the informal hearing or review decision is mailed, and may be filed electronically or by regular mail. To file electronically, e-mail your appeal to the Secretary of the Public Service Commission, Jaclyn A. Brilling, at:

Secretary@dps.state.ny.us

If you are using regular mail, send your appeal letter to:

Jaclyn A. Brilling, Secretary
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

A copy of the appeal letter should also be sent to the opposing party.

The Commission may make a determination on your appeal, reject it, return the case to the informal hearing officer for additional consideration, order a formal evidentiary hearing on the complaint or take such other action as it deems appropriate

Sincerely,

David R. LaBombard
Informal Hearing Officer

