

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

CASE 11-E-0650 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures—Appeal by Mr. Neil Brookes of the Informal Decision Rendered in Favor of Ms. Jennifer Robinson and Consolidated Edison Company of New York, Inc. (101183)

COMMISSION DETERMINATION

(Issued and Effective May 24, 2016)

COMPLAINT: Shared Meter (Landlord)  
DISPUTED AMOUNT: \$4,998  
PERIOD INVOLVED: September 15, 2008 to May 2, 2011

INTRODUCTION

The Commission received an appeal by Mr. Neil Brookes (complainant) from an informal hearing decision dated November 21, 2011, in favor of Consolidated Edison Company of New York, Inc. (Con Edison or the utility). The informal hearing officer upheld the utility's finding of a shared meter condition existing from September 15, 2008 to May 2, 2011, and the owner was therefore subject to billing by the utility for the shared area charges, as well as the 12-month shared meter assessment, pursuant to Public Service Law (PSL) §52.<sup>1</sup> For the reasons discussed below, the informal hearing officer's decision is modified.

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<sup>1</sup> A shared meter condition exists under PSL §52 when a residential tenant is billed by a utility for gas or electric service provided to areas outside the tenant's dwelling. PSL §52(1)(c) defines dwelling as "any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place...including any equipment located outside such building or structure... which is under the exclusive use and control of the occupant ..."

BACKGROUND

Complainant is the landlord/owner of a two-family residential building where a shared meter condition was determined to have existed for the first floor tenant's (Mrs. Robinson)<sup>2</sup> residential electric service, from September 15, 2008 to May 2, 2011.<sup>3</sup>

On November 10, 2010, in response to a high bill inquiry made by the tenant, the utility performed a field inspection at her residence. The utility reported a shared meter condition on the tenant's electric meter. The utility's Personal Service Field Investigation Report dated November 10, 2010, indicated that there were four occupants in the first floor unit and that the shared meter usage was coming from the basement.<sup>4</sup> The appliances in the basement that were listed on the report and billed on the tenant's account were: a hot water boiler, three 15 W bulbs, one 60 W bulb and a washer and dryer. The report further identified that the tenant was interviewed at the premise by the utility, and that she alleged there was a verbal landlord/tenant agreement allowing the tenant to use the basement for storage and also to use the washer and dryer located in the basement. The report also stated that the dryer was a gas dryer. The utility reviewed these findings and determined that the shared monthly electric usage being charged to the tenant's account was 407 kWh. The utility's calculation of 407 kWh was derived by the utility

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<sup>2</sup> The first floor unit is also known as the lower level unit.

<sup>3</sup> The informal hearing decision, and the utility's letter to complainant, dated November 7, 2011, both erroneously report these dates as February 2009 to May 2011. This error has no bearing on the conclusion reached here.

<sup>4</sup> The basement is accessible only from inside the first floor tenant's apartment or from a metal flap door on the outside of the premises which is kept locked from the inside.

estimating the usage per month for each of the tenant's appliances that used electricity. These amounts were then summed, and the total was subtracted from the first floor tenant's actual monthly billed electric history. The remaining number is then assumed to have represented the portion of the bill that was for shared usage.

By letter dated January 7, 2011, the utility informed both the complainant and the tenant that a shared meter condition existed involving the tenant's electric meter and that the owner had a legal responsibility to resolve the matter within 120 days of the date of the letter.

On February 7, 2011, complainant wrote to the Department of Public Service Office of Consumer Services (OCS) and stated that he disputed the finding of a shared meter condition at his property because the basement is part of the tenant's dwelling and is under the tenant's exclusive use and control. Complainant went on to state that the tenant used the washer and dryer in the basement, and also used the basement as a storage area. OCS forwarded the above referenced letter to the utility on February 11, 2011, and requested that it provide staff with all shared meter information, field reports, correspondence and calculations for the building in question.

On March 9, 2011, complainant provided OCS with a copy of an agreement between the tenant and himself. The agreement stated, "Both parties agree that the landlord will not be required to rewire the basement to separate the meters because we have reached a separate agreement arrangement to resolve the issue that satisfies both parties." The agreement

was signed and dated by both parties.<sup>5</sup> OCS then sent a copy of the agreement to the utility.<sup>6</sup>

On May 2, 2011, the complainant informed OCS that the tenant had moved out on April 29, 2011 and subsequently the complainant took occupancy of the apartment in question.

By letter dated July 19, 2011, OCS issued its initial decision upholding the utility's finding of a shared meter condition. Complainant disagreed with these findings and on July 25, 2011, contacted OCS to request an informal hearing. Complainant alleged that: (1) the tenant had exclusive use and control of the basement; (2) the tenants were compensated \$10 a month for the electricity used to fire the gas boiler as this was the only shared appliance; (3) tenant and complainant had a signed agreement; and (4) a licensed electrician had inspected the premise and determined that the shared usage was minimal. Complainant attached the licensed electrician's report to the above correspondence.<sup>7</sup>

On November 4, 2011, the utility credited the tenant's account for 25 percent of the shared meter assessment in the amount of \$733.72, and \$2,063.08 for the shared meter

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<sup>5</sup> Although Mr. Neil Brookes is referred to as the complainant/landlord and Mrs. Robinson as the tenant, Mr. Brookes' wife, Susan Rosser is also an owner of the building and as such also signed the agreement. Mrs. Robinson's husband, Kyle Robinson, also signed the agreement.

<sup>6</sup> In a letter to OCS, dated July 22, 2011, the complainant further explained that the tenant was compensated \$10 a month for the electricity used to fire the boiler.

<sup>7</sup> This report cannot be used in formulating the determination as the licensed electrician performed his investigation after the tenant had left the premises and was residing elsewhere.

billing.<sup>8</sup> The \$733.72 represented 25 percent of the 12-month shared meter assessment of \$2,934.89. When a shared meter condition is found, PSL §52(5)(d) requires the utility, in most instances, to "bill the owner and refund to the shared meter customer an estimated amount of charges for twelve months of all service measured by the shared meter..." This bill, which is in addition to the required billing for shared area service, is referred to as the 12-month assessment. PSL §52(5)(d) permits an owner to petition the Commission or its designee for a determination reducing the 12-month assessment, and the corresponding refund, to not less than 25 percent of the original assessment.

By letter dated November 7, 2011, the utility informed complainant that he was being billed \$2,063.08 for shared meter charges from February 25, 2009, to May 2, 2011, and a one-time 12-month billing assessment of \$2,934.89.<sup>9</sup> PSL §52(2)(a) provides that an owner is responsible for "all the shared area charges for service measured through a shared meter effective six years prior to the discovery of or determination that a shared meter condition began, or the sixtieth day after the owner knew or should have known that third party involvement exists, or the date the owner assumed the title to the dwelling, whichever is most recent in time and for all future service measured by the shared meter." Additionally,

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<sup>8</sup> Pursuant to PSL §52(5)(b) and (c), the tenant's account was credited and the owner's debited for shared area charges, which are the estimated cost of service billed to the shared meter customer that was used outside the shared meter customer's apartment.

<sup>9</sup> Although the beginning date reported by the utility is erroneous, it is a moot point, as the usage is found to be minimal.

the utility informed complainant that it would continue to bill complainant for all usage on the meter until the shared meter condition was corrected.

An informal hearing was conducted on November 10, 2011. In his decision dated November 21, 2011 the hearing officer concluded, based on the utility's November 10, 2010, inspection report, that a shared meter condition existed and that the utility's billing of complainant was proper. In addition, the hearing officer pointed to the fact that the complainant did not contact the utility as instructed when he received the shared meter condition correspondence from the utility.<sup>10</sup> The informal hearing officer asserted that had complainant contacted the utility upon receiving notice of the shared meter situation, the utility could have investigated whether there existed an exclusive use and control situation.

POINTS ON APPEAL

By letter dated November 25, 2011, Mr. Brookes appeals the informal hearing officer's decision and argues that it is erroneous for the reasons summarized below:

1. The hearing officer did not consider evidence presented at the hearing, i.e., the basement can only be accessed from the first floor unit, thereby making it a situation of exclusive use and control, which would mean that a shared meter condition never existed.

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<sup>10</sup> Complainant later pointed out that it was his belief that when he contacted OCS, and as a result of that contact OCS forwarded his correspondence and copy of the agreement between the complainant and tenant to Con Edison, the matter would then be resolved in its entirety.

2. Con Edison did not properly include the washer/dryer in the appliance worksheet which would have shown the shared usage to be minimal.
3. The hearing officer did not contact, as requested by the complainant, the tenant to verify a situation of exclusive use and control.

DETERMINATION

The primary issues in this case are whether or not a shared meter condition existed, and whether complainant was properly billed for electric service and associated assessments on the service which passed through the shared meter.

1. The utility's determination that a shared meter condition existed is modified.

The evidence supports a partial shared meter finding as there was one appliance in the basement whose electric load was billed to the first floor tenant. However, as the complainant correctly asserted, the situation should not be classified as a full shared meter condition, as the basement was under the exclusive use and control of the tenant. The only entrances to the basement were through the first floor tenant's apartment or through a hatch door to the outside of the premises which was locked from the inside and only the tenant had means to unlock it. Therefore, the only electric use and appliance that could be considered in a shared meter situation was the gas hot water boiler. All parties agreed that only the tenant used the light bulbs and the washer and dryer located in the basement. In conclusion, a partial shared meter condition exists because the gas hot water boiler is for the entire premises, is located in the basement, and uses electricity from the shared meter to ignite it.

2. The hearing officer's decision to uphold the billing was erroneous.

The evidence supports the finding of a partial shared meter condition, where usage was considered "minimal" or less than 10 percent of the total monthly consumption.<sup>11</sup> Minimal service is defined in 16 NYCRR §11.30(d)"...Whenever the quantity of service on a shared meter, that is used outside of the tenant's dwelling, is estimated to be less than 10 percent of the total monthly consumption recorded on the meter, based on average monthly service for the immediately preceding 12 month period (or if insufficient history is available, based on the best available information), or 75 kWh/month . . . the owner, tenant and any third party whose utility service was to be measured through another meter and had caused or benefitted from the shared meter condition, may negotiate a mutually acceptable agreement for the responsibility for the cost of such shared meter consumption."

OCS reviewed the utility calculations and found that the utility's calculation of electric usage for 407 kWh was unsupported because the tenant had exclusive use and control of the premises and the only shared appliance was the gas hot water boiler used for both units in the building. The industry standard for the usage associated with the electricity used to ignite a gas boiler and circulate the hot water is 46 kWh a month. This one shared appliance and the electricity used to ignite the gas water boiler constitutes minimal usage because the tenant's average usage for the shared meter period was 928

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<sup>11</sup> PSL §52(8) "Minimal service. Notwithstanding any provision of this section to the contrary, the commission shall determine an appropriate quantity of service on a shared meter that is utilized outside of the shared meter customer's dwelling which is to be considered minimal."

kWh a month <sup>12</sup> and 46 kWh is both less than 10 percent of 928 kWh, and under 75 kWh a month.

The Commission finds that as a result of the situation being one of exclusive use and control of the tenant, and the shared electric usage being minimal, that the utility erred in its billing of the complainant for both the \$2,063.08 for shared area charges, and the one-time shared meter assessment of \$2,934.89. As such, these amounts are to be credited back to the complainant by Con Edison. In addition, Con Edison is time-barred and therefore prohibited from trying to recoup any monetary funds for shared area charges it credited the tenant (\$2,063.08).<sup>13</sup>

#### CONCLUSION

To assure that all aspects of this case have been properly addressed, the complaint file has been thoroughly reviewed. The Commission finds that the evidence in the record partially supports the informal hearing officer's conclusion that a shared meter condition existed involving the tenant's electric meter. However, as the shared meter condition was

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<sup>12</sup> Because the majority of the utility's reads of the tenant's meter for the 12 month period immediately preceding the finding of the shared meter condition were estimated, rather than actual, the Commission is using the utility's average usage of the premises in question, for the period of September 15, 2008 to November 10, 2010 for calculations.

<sup>13</sup> See 16 NYCRR 11.4(a)(1).

minimal the Commission finds that the utility's billing was improper.<sup>14</sup>

The utility is directed, within 30 days of the date of this determination, to:

1. Cancel the debit to the owner's account for the 12 month assessment;
2. Cancel the debit to the owner's account for the entire amount of the shared area charges. The utility is time-barred from issuing a corresponding debit to the tenant's account; and
3. Inform the Secretary to the Commission, in writing, that it has done so.

Therefore complainant's appeal is granted and the informal hearing decision is modified.

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<sup>14</sup> PSL §52(5)(d) states that when such determination follows a customer complaint regarding a shared meter condition or a utility discovery of a shared meter condition that is not in response to an owner's request for a utility inspection for a shared meter condition, with respect to utility service billed after December first, nineteen hundred ninety-six, the utility shall comply with the provisions of paragraphs (a), (b) and (c) of this subdivision, and further bill the owner and refund to the shared meter customer an estimated amount of charges for twelve months of all service measured by the shared meter; provided, however, that this paragraph shall not apply to a shared meter condition if service measured through the shared meter is minimal under commission rules adopted pursuant to subdivision eight of this section.