

**BEFORE THE NEW YORK STATE  
PUBLIC SERVICE COMMISSION**

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**170 Broadway NYC LP,** :  
**Appellant** :  
 :  
**v.** : **No: 440805**  
 :  
**Consolidated Edison Company of** :  
**New York, Inc.,** :  
**Appellee** :  
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**RESPONSE OF CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC. TO APPEAL FROM DECISION OF  
INFORMAL HEARING OFFICER**

**I. INTRODUCTION**

On January 26, 2016, the Hearing Officer issued an Informal Hearing Decision (“Decision”) denying the complaint of 170 Broadway NYC LP (“Customer”), against Consolidated Edison Company of New York, Inc. (“Con Edison”) in the above-referenced proceeding. On February 24, 2016, Customer filed an appeal (“Appeal”) of the Decision with the Public Service Commission (“Commission”). As demonstrated below, Customer fails to establish a basis for appealing the Decision and, accordingly, the Appeal should be rejected.

**II. BACKGROUND**

The relevant facts were described in the Decision. In summary, the Customer disputes Con Edison’s bills for the period March 2013 to March 2014, a time during which the Customer was renovating a 21 story office building in lower Manhattan (“Building”) for use as a hotel.

Con Edison’s consumption meter at the Building allows for calculation of the cumulative consumption and consumption during the current billing period. As noted by the Decision (p. 6),

Con Edison obtained numerous actual readings during the period, and corrected any over or under estimated bills based on those readings. In response to a high bill complaint initiated by the Customer, Con Edison inspected the Customer's meter on February 21, 2014 and found the meter was working properly.

In response to continued Customer concerns on the accuracy of the Building's consumption meter, on November 10, 2014, Con Edison removed the Customer's meter and installed a new one. Con Edison then tested the Customer's original consumption meter in accordance with the Commission's regulations (*i.e.*, 16 NYCRR Part 92) on November 14, 2014, and found it to be recording at 99.8 percent accuracy, within the accepted limits of the Commission's regulations. Finally, on May 27, 2015, Con Edison also tested the current transformer and found the equipment to be working properly.

### **III. ARGUMENT**

Customer's request for appeal of the Informal Hearing Decision should be denied as it has failed to establish any basis for its request. As described in the Decision (p. 9), the basis for appealing such a decision is limited to one or more of the following grounds:

1. The hearing officer made a mistake in the facts or in the laws/regulations which affected the decision;
2. The hearing officer did not consider evidence presented, which resulted in an unfavorable decision; and/or
3. New facts or evidence not available at the time of the hearing have become available.

Customer alleges that the Hearing Officer made mistakes in material fact and failed to consider evidence. Specially, it claims that the Hearing Officer (i) erred by failing to consider the discrepancy between transformer readings and the building's meter readings; (ii) misunderstood the evidence regarding the physical capacity of the equipment to deliver

electricity; (iii) misconstrued the electric survey; and (iv) ignored facts that shed doubt on the accuracy of the meter test. As demonstrated below, Customer fails to demonstrate error or omission by the Hearing Officer on any of the above issues. Its request for appeal should thus be denied.

**A. The Results of the Meter Tests Refute the Customer’s Complaint**

In its Appeal, the Customer makes a number of claims and allegations. As recognized by the Decision (p. 8), however, the fundamental issue that the Commission must decide in this matter is very straightforward. Specifically, was the Customer billed correctly for the electric service that Con Edison provided to the Customer at the Building? Despite the Customer’s strong assertions to the contrary, the evidence provided to the Hearing Officer demonstrates that Con Edison did bill the Customer correctly.

As discussed above, the consumption meter measuring the Customer’s electric consumption at the Building was inspected and tested and found to be working properly on each occasion. The tests were conducted in accordance with the Commission’s regulations, *i.e.*, 16 NYCRR Part 92, and showed the meter to be functioning at 99.8 percent accuracy, which is well within the Commission’s established limits of accuracy. Moreover, the current transformer equipment was also tested and found to be operating properly. In the Appeal, Customer offers no evidence to the contrary. The results of the meter tests provide the evidence necessary for Con Edison to meet the burden of proof requirement set forth in PSL Section 43(2)(b).

The Appeal (p. 11) seeks to undercut the Decision by arguing that the transformer data demonstrates that the Customer was overbilled. As noted by the Decision (p. 8), Con Edison’s transformer data does not conclusively show that the consumption meter was faulty, and although it is unknown what caused the meter to detect and register the high demands, “there is

no evidence of meter malfunction.” That meter tests are sufficient to prove proper billing is consistent with Commission precedent. *See, e.g., Commission Determination on the Appeal by Park Belvedere of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc.*, Case 06-E-1084 (Oct 18, 2010) (upheld on rehearing by order dated May 23, 2011) (“*Park Belvedere*”). In that case, the Commission found Con Edison met its burden of proof and showed its billing was proper through its meter inspection and meter tests. Customer claims in its Appeal (p. 15) that *Park Belvedere* has no precedential value to this case because unlike *Park Belvedere*, Customer has submitted affidavits and other sworn evidence in this case. The customer apparently also relies on the fact that in *Park Belvedere*, the dispute was over a smaller amount of consumption. Finally, the Customer relies on the fact that in *Park Belvedere*, the meter test was performed with the supervision of PSC Staff. That the Customer has submitted sworn evidence and has a larger magnitude bill impact does not change Con Edison’s standard for burden of proof. A customer can submit evidence showing a utility’s meter inspections and test were inaccurate. The customer in *Park Belvedere* submitted evidence that was unpersuasive, and in the instant case, the Customer has done that same. It is also worth noting that PSC Staff is only present for meter tests if the Customer requests a “referee test” under 16 NYCRR Part 92. In the instant case, the Customer did not request such a test.

**B. The Commission Should Ignore Claims That The Hearing Officer “Misunderstood” the Arguments Regarding The Physical Capacity of the Building**

In the Appeal (p. 9), the Customer argues that the Decision should be reversed because the Hearing Officer misunderstood two pieces of evidence regarding the physical capacity of the building. The first “misunderstanding” that the Customer points to is on a minor point that had no bearing on the Hearing Officer’s Decision and does not speak to the “physical capacity” of

the building. The Customer claims in its Appeal (p. 9) that in a January 2012 letter, it gave Con Edison its projected load for once the hotel began operations. It argues that the Hearing Officer misunderstood the evidence as being the projected load during renovations, and that it “defies logic to assume that during construction, the actual electric load...could be more than the connected load during full operation of the hotel.”

Con Edison does not concede that the subject matter of the load projection was clear in Customer’s January 2012 letter. Even assuming that the letter did project the load for once the hotel began operation rather than during renovation, it is not a material issue. As noted by the Decision (p. 8), the salient point is that Con Edison is not responsible for determining what caused the Building’s high electricity demand, or why it was not in line with the Customer’s projections. This is true regardless of whether those projections were for full hotel occupancy and operations or for the renovation period. In this case, the meter was tested and found to be accurately measuring consumption. Customer’s projections of its load use are not evidence of the physical capacity of the Building, and deviations from the Customer’s projection are not the responsibility of Con Ed. *See Park Belvedere* at 22 (finding that “[a] utility has no ability to know, much less prove, how service was used by a large commercial customer. Con Edison was not required to explain retroactively what equipment, used in what manner, produced demands complainant did not challenge until approximately one to eight years after the fact.”)

The Customer further argues that Con Edison’s response to the January 2012 letter stated that the service take-off from the Building was limited to 1,135 kW and so could not have carried the amount of power the Company’s meter measured. The Company explained to the satisfaction of both the OCS and the Hearing Officer (Decision at pp. 3 and 6), that the notification to the customer on available service included a sizable safety factor and does not

mean that the service take-off was physically limited to that amount. Importantly, the Customer proffers no evidence of mistake in fact as to this point.

The second “misunderstanding” alleged by Customer is that the Hearing Officer misunderstood the nature of the temporary service. The Customer claimed at the Informal Hearing that a 1,200 amp switch was installed in January 2013, was used for temporary service during renovations, and that this switch would have melted if loads as high as what was billed were imposed on it. However, the Customer also submitted a picture showing empty cabinets (no switch) taken in January 2013, and an electrical diagram showing a 1200A CT cabinet was added in August 2014. The Hearing Officer determined (p. 7) that the Customer’s testimony was inconsistent and that it did not present compelling evidence that the 1,200 amp switch was, in fact, used during the renovations.

In its Appeal (p. 11), the Customer concedes that the 1,200 amp switch was not installed in January 2013 as previously testified. The Customer now claims that the switch was installed in February or March 2013 and that the CT cabinet was separately installed to house the switch (p.10). Confusingly, the Appeal states the CT cabinet was also added in February or March 2013, which still conflicts with the electrical diagram showing it was added in August 2014 (p. 11). The Commission should recognize this argument for what it is: an attempt by the Customer to change its story and then claim the Hearing Officer “misunderstood” the evidence it presented. The crucial fact that the Customer did not submit reliable evidence that the 1,200 amp switch was in use during renovation remains unchanged.

Moreover, the Hearing Officer found that prohibited actions were taken by the Customer’s contractor within the CT cabinet (p. 8). Con Edison put forward evidence of actions that could have been taken to keep the switch from burning out under the peak demand billed.

Thus, even if the Hearing Officer had concluded (against the evidence) that the switch was in place during the applicable period, unmonitored actions at the Building could have caused the switch to withstand the load measured by Con Edison's meter. In sum, the Customer's allegations that the Hearing Officer "misunderstood" its arguments are entirely without merit and should be dismissed.

**C. The Commission Should Ignore Claims That The Hearing Officer "Misconstrued" the Electrical Survey**

In the Decision (p. 6-7), the Hearing Officer summarized Customer's survey of electrical equipment at the Building and concluded that she "was not convinced that 750 kW winter load adequately represents the construction site load and the list of the surveyed equipment is complete." The Customer claims in the Appeal (p. 14) that the Hearing Officer did not understand that the survey was of equipment that would have been in place during the period March 2013- August 2014, and that her "surmise that there was more equipment on the premises has no foundation in the record." The Commission should reject the Customer's claim out of hand.

The Hearing Officer reviewed the tests of Con Edison's equipment and determined (p. 6) that the "utility's equipment which delivered and measured electric service did not malfunction." The very fact that the survey conflicts with the measurements of a meter tested and found to be accurate is a rational reason to posit that there may have been more equipment on the premises. There is no reason that an after-the-fact survey of electrical equipment should be considered complete or accurate on its face, or that an alleged misunderstanding as to the scope of the survey would have a material effect on the outcome of this case. Con Edison met its burden of proof by testing the meter and demonstrating it was working properly and recorded the actual usage of the Customer. It had no obligation to put further evidence in the record showing the

survey was faulty and the Hearing Office would have had no basis to require it. *See Park Belvedere* at 22 (finding that “[a] utility has no ability to know, much less prove, how service was used by a large commercial customer. Con Edison was not required to explain retroactively what equipment, used in what manner, produced demands complainant did not challenge until approximately one to eight years after the fact.”).

**D. Customer’s Other Arguments Should Be Rejected**

The Customer’s attempt in the Appeal (pp. 14-15) to dismiss the evidentiary value of the meter test results based on “discrepancies” between the meter readings and its evidence is wholly unpersuasive. Customer claims that the Hearing Office should have questioned the meter test results and ordered further investigations because of alleged discrepancies between its evidence and the meter readings. Each of the supposed “discrepancies” are discussed and refuted above. These same discrepancies were not overlooked at the Informal Hearing, but rather found to be unpersuasive. That the evidence presented by the Customer was not compelling enough for the Hearing Officer to seriously question the accuracy of the meter test, much less order further investigation, highlights the infirmities of the Customer’s position.



