STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 10-E-0356 – In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures—Appeal by Hazel Towers Tenants Association, Inc. of the Informal Decision Rendered in Favor of the Nelson Management Group, Ltd. (814524).

COMMISSION DETERMINATION
(Issued and Effective February 19, 2013)

The Commission has received an appeal by Hazel Towers Tenants Association, Inc. (complainant or the Tenants Association)[1] from an informal hearing decision dated July 12, 2010, in favor of Nelson Management Group, Ltd. (the owner or Nelson Management), owner or manager of Hazel Towers, a rent-stabilized building with 286 apartments, in the Bronx.[2] The informal hearing officer found that the owner was in compliance with a Commission order[3] (2001 Submetering Order) allowing submetering at Hazel Towers and that the owner's billing of the building's tenants for submetered electric service was appropriate. For the reasons discussed below, we reverse the informal hearing decision in part.

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[1] The Tenants Association is represented by Gerald Norlander, Esq., Public Utility Law Project of New York, Inc.

[2] The owner is represented by Harris Beach PLLC, Attorneys at Law. The owner was identified as Hazel Towers Company, L.P., by its attorney in a letter to staff of the Department of Public Service's Office of Consumer Services (OCS), dated February 8, 2011, and was so identified, also, in 2007, see n. 5 below.

[3] Case 00-E-1269, Petition of Herbert E. Hirschfeld to submeter electricity at Hazel Towers, Order Granting Approval to Submeter (issued January 3, 2001)(2001 Submetering Order). The petition is by a professional engineer and the owner, described as a "private entity," is not identified.

BACKGROUND

The Tenants Association is a not-for-profit organization (established in 1991) of tenants residing at Hazel Towers. Under the 2001 Submetering Order, regulated rents had to be reduced, and other specific conditions met, before submetering could start.[4] Over three years after that Order was issued, the owner obtained a determination from the New York State Division of Housing and Community Renewal (DHCR), Office of Rent Administration, issued May 27, 2004, permitting termination of "rent inclusion of electric current" and installation of "individual meters in the apartments or building," after which "tenants will pay their own electric bills." This determination also specified the schedule for rent reductions which would apply to each apartment as submetering began.[5]

Although DHCR approval was obtained in 2004, submetering at Hazel Towers did not begin until April 1, 2007. Approximately one year after submetered electric billing began, the Tenants Association complained by letter dated June 4, 2008, to OCS about the owner's implementation of submetering.[6]

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[4] See 2001 Submetering Order, pp. 4-5, requiring, among other things, incorporation of specific information into tenants' leases, before submetering might begin.

[5] The DHCR determination (which identifies the owner as Hazel Towers, Co., L.P.) sets the amount of the monthly fee (permitted in general terms by the 2001 Submetering Order) the owner may charge each submetered tenant at $4. The DHCR determination also clarifies that, in addition to a rent reduction, each submetered tenant must also be relieved of any previously authorized monthly charges for energy using appliances (such charges had applied at Hazel Towers for tenant-owned air conditioners), and that submetering would not be applicable to any tenant receiving a Senor Citizen Rent Increase Exemption (SCRIE) at the time of conversion.

[6] By petition filed May 6, 2009, in Case 00-E-1269, the Tenants Association then asked the Commission for investigation and remediation of noncompliance with the 2001 Submetering Order and (continued)

By letter dated August 21, 2009, an OCS staff member issued an initial decision on the complaint. That decision found some violations of HEFPA and some instances in which individual tenants were billed in excess of the owner's calculation of the "rate cap" despite the requirements of the 2001 Submetering Order, our regulations, and the tariff of the relevant distribution utility, Consolidated Edison Company of New York, Inc. (Con Edison). The "rate cap" is defined in the 2001 Submetering Order as the amount Con Edison would charge a tenant for electric service, were the tenant a direct-metered residential customer.[7] The decision rejected the Tenants Association's argument that because the owner, before starting to submeter each tenant, had not (as required by the 2001 Submetering Order) included new language in leases or lease riders adopted following expiration of leases previously in effect, that explained or provided information on four specific points, i.e., "the method of rate calculation [and] rate cap,

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other relief, for similar reasons to those raised in the complaint to OCS, as well as because of claimed delay by OCS. The Commission responded by issuing a notice establishing a comment period, and in accord with the notice, both comments and responses to the comments were submitted. Subsequent activity in Case 00-E-1269 includes a letter filed September 29, 2009, by the Tenants Association seeking a subpoena duces tecum, and a petition filed February 8, 2011, by the owner seeking amendment of the 2001 Order to permit the owner to terminate electric service to tenants who fail to pay electric bills.

[7] The 2001 Submetering Order, at p. 3, includes this requirement as part of its overall statement of the rate to be charged submetered tenants: "Rates and charges paid by tenants will be based on the actual costs to the applicant. To establish the monthly rate for electricity to the tenants, the total building Con Edison charge will be divided by the total building consumption (kWh) as measured by Con Edison. In addition, the monthly cost of electricity to the tenants will also include a monthly billing service charge. However, in no event will the total charges (including any charge for billing) exceed the Con Edison residential rate for direct metering."

complaint procedures, tenant protections, and the enforcement mechanism,"[8] all payments for submetered electricity made prior to inclusion of such language in a tenant's lease must be refunded. Before issuing its initial decision, staff had required the owner to review the submetered billing and refund any overbilling. According to the initial decision, this resulted in a total refund to tenants of approximately $20,392.64 "plus interest charges (where applicable)"[9] for eight specific monthly billing periods within the longer period starting April 1, 2007, and ending December 3, 2008.

By letter to OCS dated September 8, 2009, the Tenants Association (stating it had received the initial decision on August 24, 2009) requested an informal hearing. At OCS's request, complainant, by letter dated October 27, 2009, explained its objections to virtually every conclusion stated in the initial decision. By letter to staff dated January 14, 2010, complainant supplemented its earlier submission, and argued that the owner's billing of tenants had not been properly reviewed and gave examples of specific 2009 bills to tenants that it contended exceeded the rate cap. By letter dated February 12, 2010, complainant notified staff that it was requesting that additional records be provided by the owner; later the same month, the owner complied partially (providing detailed information on the billing of submetered tenants during 2007 and 2008 billing periods in which the owner had informed staff that billing in excess of the rate cap had originally

[8] 2001 Submetering Order, p. 4.

[9] Initial Decision, p. 3. A more recent spreadsheet on refunds during the 2007 and 2008 period, provided by the owner's February 26, 2010 letter, for purposes of the informal hearing, gives the total refund amount as $23,676.98 and indicates that interest totaling $11,528.20 was paid on that amount (resulting in an overall total for the eight billing periods, including interest, of $35,205.18).

occurred and then been corrected, but refusing any billing information for 2009 or copies of any Con Edison bills to the owner for the building).

An informal hearing was conducted on April 28, 2010. During the hearing, the owner agreed to supply additional information to the hearing officer and to complainant so that it could be considered in the decision; some of that information was provided (Con Edison bills) but the remainder was not. In a decision dated July 12, 2010, the informal hearing officer concluded that the owner, after interacting with Staff and making certain refunds to customers, and after supplying certain language in new leases or lease riders in 2009, had satisfied the requirements of the 2001 Submetering Order and that no further corrections to the electric billing were required.

POINTS ON APPEAL

By letter dated July 27, 2010, supplemented by letter dated November 19, 2011, the Tenants Association appeals from the hearing officer's decision arguing that it is erroneous. The issues raised by the Tenants Association are summarized below:

1. The hearing officer, without explanation, "refused" at the hearing to "take testimony or evidence" of continued violation of the rate cap, "including significant new overcharges ... imposed immediately after the Initial Decision," and refused to grant the requested relief of "a full audit of all charges."[10]
2. New facts and evidence of submetering overcharges, not available at the time of the informal hearing, would have affected the decision.

[10] Appeal, p. 16.

3. In violation of the 2001 Submetering Order, the owner did not establish valid agreements with tenants permitting provision of submetered electric service in violation of the 2001 Submetering Order.
4. Submetered electric charges were improperly collected without compliance with the Submetering Order and should be refunded.

The owner responds by letters dated August 30, 2010, and November 4, 2011. The August 30, 2010 response states only that since the date of the informal hearing (April 28, 2010), the owner has continued to monitor its billing of submetered tenants for electricity to ensure that they are not billed more than they would have been at the utility's rate for its own, directly metered, residential customers. The owner's November 4, 2011 response (in response to a request from staff) addresses the specific arguments made in the appeal.

Complainant's letter of November 19, 2011, was submitted in reply to the owner's November 4, 2011 letter.

DETERMINATION

The basic issues on appeal are whether the owner billed submetered tenants properly, and whether the owner complied with the Commission's Order allowing submetering. For the reasons explained below, we uphold the informal hearing decision in part and reverse it in part.

1. Information about submetered charges during 2009 shows that some tenants are due refunds with respect to charges billed during one billing period.

The Tenants Association argues that the informal hearing officer improperly "refused" at the hearing to "take testimony or evidence" of continued violation of the rate cap, "including significant new overcharges ... imposed immediately after the Initial Decision," and refused to grant the requested

relief of "a full audit of all charges."[11] It also argues that new facts and evidence of submetering overcharges not available at the time of the informal hearing, but now available, would have affected the decision.

Complainant documents, in e-mails compiled in Attachment F to its appeal, that following the informal hearing (conducted on April 28, 2010) the owner had agreed to provide the 2009 billing information requested, and that, by e-mail dated Friday July 9, 2012, the owner told the hearing officer that the company handling submetering for it was "getting the management reports together and they will be produced as soon as that is completed," and stated its belief that the information would be available "by the middle of next week." Three days later, on Monday July 12, 2012, the informal hearing officer issued his decision, without having received the information, and without explaining why it was unnecessary for him to review it or to allow complainant to comment on it. Given the many flaws admitted by the owner in the billing during 2007 and 2008, and the nature of the allegations made about billing accuracy, it would have been appropriate for this information to have been obtained and considered before the informal hearing decision was issued.

In view of the absence from the record of any information about how the owner had, in fact, billed tenants during 2009 (apart from the owner's assurances that its billing was proper), the record on appeal was properly supplemented on January 24, 2012, by the owner's provision (in response to staff's December 27, 2011 request[12]) of such information. In the

[11] Appeal, p. 16.

[12] Staff requested information for all 2009 billing periods, rather than the four specific periods sought by complainant, February 4, 2009 to March 6, 2009, June 4, 2009 to July 6, 2009, (continued)

e-mail accompanying its January 24, 2012 submission, the owner says the reports submitted for each billing period do not include any "credits/refunds ... since the bulk and direct rates were compared each month and the lower rate was applied," and notes that the lower rate was applied to 23 tenants during the February 4, 2009 to March 6, 2009 billing period.

After reviewing the information, the Tenants Association responds by letter dated February 17, 2012, that the owner's submission "is impossibly vague as to how the hypothetical Con Edison charges were calculated," that the submission "makes no reference at all to the applicable filed rates in force for the relevant periods, which are available at the Con Edison website," and includes numbers "for Con Edison rates on the first page of each month's submission [that] do not tally with the published rates for the applicable periods."[13] It also says that the owner's calculation of the rate cap does not appear to properly reflect "all the rate components included in developing" the total filed rate.[14] Based on its calculations of "hypothetical bills" for 31 tenants for the August 4, 2009 to September 2, 2009 billing period, the Tenants Association says that the owner's electric bills exceeded what they would have been charged by Con Edison as direct residential customers, and asserts that there should be a full independent audit of all electric bills issued by the owner since the advent of submetering.[15]

OCS has used its access to Con Edison's electronic billing records system to calculate, for each of the 31 tenants

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August 4, 2009 to September 2, 2009, and September 2, 2009 to October 1, 2009.

[13] Tenants Association letter dated February 17, 2012, p. 2.

[14] Id.

[15] Id., pp. 2-3.

(using the same software available to Con Edison representatives[16]), the total amount Con Edison would have billed a full-service, residential electric customer at the utility's residential rate (SC No. 1), residing in New York City, for the same consumption, during the same August 4, to September 2, 2009 billing period. The results show that all 31 challenged bills were, indeed, significantly lower than the amount Con Edison would have charged had the tenants been direct residential customers. However, the results also showed, consistently, that the owner's calculations of the rate cap for tenants with the highest usage bills during the relevant period, were from $2.58 to $5 higher than they should have been (with the difference increasing with the amount of usage). (See Appendix 1 showing the relevant information for the 31 questioned August 4, to September 2, 2009 bills.)

Since the owner had reduced 23 tenants' bills for the February 4, to March 6, 2009 billing period to its version of the rate cap, the finding described above suggested a possible problem, which further review shows had indeed occurred: the reductions the owner made to the 23 tenants' submetered charges for that billing period (February 4, to March 6, 2009) were inadequate because for those 23 tenants the actual rate cap (obtained by staff's use of Con Edison's calculator) was from $1.95 to $3.46 lower than that calculated by the owner. Accordingly, rebilling is required for these 23 customers. (See

[16] The calculator available to staff is not what is used by the utility to prepare the bills sent to its customers, which must be broken down in a specific and more detailed manner, and are prepared for large numbers of customers. However, for a Service Classification (SC) No. 1 bill, and with entry of the other necessary parameters (regarding location, amount of usage, and billing period dates), the calculator to which staff has access produces the same dollar amount for a given single billing period as the amount Con Edison charges a residential customer meeting those same parameters.

Appendix 2, page 1, showing, for each of the 23 accounts, the relevant information including the additional rebilling required.)

In addition, review shows that other tenants were overbilled for the February 4 to March 6, 2009 billing period, because the owner miscalculated the rate cap and the correct version of the rate cap (verified by Con Edison's calculator) is lower than the owner's prorated bulk billing of these tenants. Rebilling of the bills for these 20 customers is also warranted. (See Appendix 2, page 2, for the relevant information for each of these accounts, including the rebilling warranted.)

All other billing periods ending during 2009 were also checked. In a majority of those periods, the owner's calculation of the rate cap appears to have consistently exceeded Con Edison's SC No. 1 (residential) rate for comparable usage; during the remaining periods the owner's version of the rate cap appears to have been consistently below the amount Con Edison would have charged at its residential rate. However, during the 2009 billing periods, with the exception of the February 4, 2009 to March 6, 2009 billing period, the owner's billing of Hazel Towers tenants based on proration of the SC No. 8 bulk rate (including a $4 fee) complied with the requirement that such billing not exceed the rate cap as it would have been calculated by Con Edison.

We directly establish the rates a submeterer may charge a residential occupant through our regulations and through the individual orders that authorize residential building owners to submeter. Moreover, since 2004, submetered residential tenants and occupants have had the right to complain to OCS about a building owner regarding submetering,[17] and, under

[17] See PSL §53, as amended, effective June 18, 2003, which states that any reference in PSL Article 2, Residential Gas, Electric and Steam Utility Service, to "a gas corporation, an electric (continued)

our regulations, such complaints "may involve bills for utility service ... and other matters relating to utility service."[18] Under both circumstances, the obligation of a residential building owner to ensure the accuracy of its submetered billing of tenants for electricity is one we may enforce.

The 2001 Submetering Order applicable to Hazel Towers established a method of billing tenants – proration among them, based on their electric usage during the relevant period, of the so-called "bulk" monthly bill the owner pays, at a nonresidential rate, SC No. 8, for all electricity provided to the meter providing the electricity distributed by the owner to the tenants' apartments, plus a $4 administrative fee – that for the most part results in tenants' bills falling below the rate cap. Nevertheless, such an owner is required to ascertain the rate cap correctly for each residential occupant's bill and to properly reduce the occasional bill, whenever there is one, that exceeds the correctly-calculated rate cap. The identified failures to do so here have small monetary consequences. However, a submetered customer is entitled to no less than an electric bill calculated with the same accuracy as would be provided had the occupant been directly metered by Con Edison. Moreover, these failures indicate a problem that should be addressed in the first instance by submeterers and by Con

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corporation, a utility company, or a utility corporation shall include, but is not limited to, any entity that in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers." Our regulations regarding consumer complaints to the Commission, 16 NYCRR Part 12, which are mandated by Article 2, have been amended accordingly, and now establish that complaints may be filed with the Office of Consumer Services against "owners of submetered residential buildings." (16 NYCRR §12.0.)

[18] Section 12.1(a) of 16 NYCRR.

Edison, and if necessary, by staff: how to ensure that a building owner is properly calculating the rate cap.

In this case, in addition to requiring the owner to rebill the 43 customers and to make appropriate refunds from the date of overpayment, and with interest from that date at the rate required by our regulations (16 NYCRR Part 145), we also state as clearly as possible that it is the owner's responsibility to consult Con Edison regarding how it can better ensure that - consistent with the 2001 Submetering Order, our regulations, and Con Edison's own tariff - the calculation it uses to determine the rate cap is accurate. While measures to assure this accuracy may initially be difficult or expensive, they are necessary to assure that the owner is no longer at risk of charging a tenant in excess of the permissible amount for submetered service.

2. Agreement by tenants to submetering was not necessary, but commencement of submetering prior to inclusion of required information in tenants' leases was not consistent with the 2001 Submetering Order.

The Tenants Association makes related arguments on appeal that the owner was required by the 2001 Submetering Order to enter into "valid agreements" with each tenant before submetering could commence and that the owner never complied with other requirements of the 2001 Submetering Order before initiating submetering. For both reasons, the Tenants Association urges that refunds of all submetered charges are required.

a. Tenant agreement to submetering was not necessary.

The Tenants Association says that the 2001 Submetering Order clearly contemplates that submetering would not occur without the formation of valid new leases. It says that the hearing officer's conclusion that the amended lease rider now includes the necessary information misses the point because the rider is not executed. It cites a Canadian administrative order

for the proposition that "[i]n the absence of any viable agreement for electric service, without proof of knowing tenant consent, and without full compliance with the 2001 Submetering Order, [the owner] and its agents are not authorized to resell electric service to Hazel Towers tenants."[19] It says the hearing officer's apparent theory that agreements between the owner and tenants "can be modified or abridged by OCS fiat" was "inconsistent with the Constitution."[20] It claims as well that there is no evidence that the new rider was actually proffered to any tenants or actually accepted by them and therefore all submetered charges collected prior to adoption of such leases must be refunded.

The owner responds that, "as the Commission stated in Case 91-E-0241 [Tiffany Mews], there is 'nothing in the Public Service Law or Commission regulations that requires submeterers to file tariffs or contracts for the provision of submetered electric service.'"[21] It says that in Riverview II[22] (relied on in Tiffany Mews), the Commission rejected a claim that a rehearing was merited because the Commission erred by allowing submetering to commence before the time of lease renewals and without informed consent of the tenants to modified leases. It also cites Riverview II for the proposition that the Commission has determined that no provision for tenant consent or "informed consent" exists in submetering regulations or orders.[23] It adds

[19] Appeal, p. 9, citing In the Matter of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B, Decision and Order, August 13, 2009, p. 18.

[20] Appeal, p. 10.

[21] Owner's Response dated November 4, 2011, p. 3, quoting Case 01-E-0241, Petition of Tiffany Mews Limited Partnership, Order (issued July 19, 2011), p. 8.

[22] Case 08-E-0439, Petition of Riverview II Preservation, LP, Order Denying Petition for Rehearing (issued June 25, 2010).

[23] Id., p. 4.

as well that the case cited by the Tenants Association as supporting its claims regarding the need for informed consent and executed lease riders is from Ontario, Canada and has no precedential value here.

In its reply, the Tenants Association attempts to distinguish Riverview II asserting that, while it may be literally true that the words "consent" or "agreement" of tenants to terms and conditions of submetering do not appear in that order, the Riverview II order does contemplate tenant assent.[24] Additionally, seeking to bolster its reliance on the Ontario, Canada case, the Tenants Association notes that the owner does not question the reasoning of the opinion but rather urges the Commission to pay no attention to it simply because it was written by a different regulatory body. It cites authority for the proposition that the judgments of other nations are not dispositive but are also not irrelevant.[25]

This aspect of the Tenants Association appeal indicates no basis for reversing the informal hearing officer's decision.

b. The owner improperly initiated submetering at Hazel Towers prior to incorporation into tenants' leases of four provisions required by the 2001 Submetering Order.

In its appeal (pages 7-16), the Tenants Association claims that submetering was not phased in when leases were renewed and that Hazel Towers has thus collected charges from the inception of submetering until the latest rider was effective without being in compliance with the 2001 Submetering Order. It contends that a refund of all submetering charges collected before this was done was required.

The owner responds that it "was permitted to begin submetering upon issuance of the Order on January 3, 2001," and

[24] Tenants Association November 19, 2011 Reply, p. 6.

[25] Id., p. 7.

since it began submetering after that occurred (in April 2007), "all submetering charges were properly ... collected ... and no refunds are warranted under the theory that Nelson Management lacked authority to submeter" because, as the hearing officer found, "no basis" existed to order a refund.[26]

In its November 19, 2011 reply (page 2), the Tenants Association notes that submetering is not an unqualified right. It says the owner fails to mention that the 2001 Submetering Order is "premised upon the owner's representations – and the Commission's clear expectations that the relevant regulatory criteria for submetering would be satisfied before tenants were charged for electric service"; it also says it is clear from the record that "essential components of the Commission's submetering regime were not in place when submetering was wrongfully begun" by the owner. The Tenants Association says that if the informal hearing decision is affirmed, and submeterers can begin submetering without providing the consumer protections contemplated by the Commission, "the clear lesson to submeterers is that they need only give lip service to providing notice of the proceeding and implementing the customer protections."[27]

The 2001 Submetering Order unambiguously required that:

> The method of rate calculation, rate cap, complaint procedures, tenant protections, and the enforcement mechanism will be incorporated in plain language in all leases governing submetered apartments. [Emphasis added.]

[26] Owner's November 4, 2011 Response, p. 6 (the owner refers to the Informal Hearing Decision, p. 12).

[27] Tenants Association November 19, 2011 Reply, p. 3.

The same information was also required by both our regulations and by Con Edison's tariff to be included in lease provisions applicable to tenants before they could be submetered.[28]

While the directive in our 2001 Submetering Order was explicit and clear, the owner's first attempt at compliance, the November 2008 Rider, occurred more than a year after it was required. This rider, however, contained erroneous information, and was superseded at staff's direction by a new rider in August 2009.[29] The owner does not purport to have complied in any timely way with the requirement to include the requisite information in leases or in appropriate riders to leases before starting to bill tenants for submetered electric service.

Though the owner did not provide leases or lease riders containing the information explicitly required by our Submetering Order for over two years after initiating submetering, it did not seek at any time to amend that Order to alter the requirement to provide such information through the lease or lease rider. On appeal, the owner takes the position that its failure to comply with the order was irrelevant because it "had authority to begin submetering upon issuance of the Order" and "any concerns the tenants may have with their leases

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[28] See 16 NYCRR §96.2(b)(7), and PSC No. 10, Rider G – Submetering, Original Leaf No. 185 (effective February 20, 2012). The same language was contained in the utility's prior tariff in effect through February 19, 2012. PSC No. 9, Original Leaf No. 93 (effective January 1, 1994, to March 4, 1997) and 1st Revised Leaf No. 93 (effective May 26, 1997, to April 1, 2010), and 2nd Revised Leaf No. 93 (effective April 1, 2010 to February 19, 2012).

[29] The November 2008 Rider (Exhibit I to the owner's November 13, 2008 letter) included a statement that submetered electric service could be terminated for nonpayment, although the 2001 Submetering Order, p. 3, stated that "[i]n no case will electricity be shut down in an apartment for a failure to pay for electricity."

are not for the Commission to adjudicate."[30] Earlier, in its November 13, 2008 letter to OCS, the owner presented a variety of written information about submetering provided to tenants before and after submetering began. While using alternate methods to provide tenants with information comparable to the provisions required to be incorporated into leases might have been desirable, it would not have met the requirements explicitly set forth in the 2001 Submetering Order. Moreover, a careful reading of the various memos and letters sent to tenants before and after initiation of submetering indicates that they fell far short of supplying the information required by our order.

The owner claims that Case 06-E-0701[31] (Solow Management) supports its contention in this case that it was permitted to start submetering under the 2001 Submetering Order even though it had not, in compliance with that order, first incorporated any of the necessary provisions into the leases of affected tenants. That order provides no such support. In Solow, the owner, in advance of obtaining a submetering order from the Commission, went ahead and incorporated the necessary provisions into tenants' leases as they came up for renewal, but then started submetering some tenants while its request to the Commission for permission to submeter was still pending. The owner of that building, itself, then brought the erroneous billing to the Commission's attention and stated its intention to make full refunds to all affected tenants, which it did. Submetering approval was then granted. There is nothing in Solow Management indicating that, in the current case, Nelson Management acted properly in commencing submetering in 2007

[30] November 4, 2011 Response, p. 6.

[31] Case 06-E-0701, Petition of Solow Management Corp. to Submeter Electricity at 501 East 87th Street, New York, New York, Order Approving Petition (issued February 28, 2008).

(long after the 2001 Submetering Order was issued) without ever having implementing the order's requirements to incorporate the specified provisions regarding submetering into tenants' leases.[32]

Our review of the extensive record indicates that the owner did not comply in any timely manner with one of the requirements of the 2001 Submetering Order, the requirement for the incorporation of certain provisions into tenants' leases. However, to the extent that tangible harm resulted, it was corrected earlier as a result of the Tenants Association's complaint and through communications with OCS staff, or is being corrected now. Regarding billing concerns, refunds were provided, with interest, for 2007 and 2008, after the owner reviewed its bills in response to staff's explanation of the need to ensure compliance with the rate cap. The aggregate refunds for this period were not insignificant (the total amount refunded to tenants for overbilling from April 2007 through December 2008 was $23,676.98, and, with the addition of interest, totaled $35,205.18); but the bulk of this amount came during 2007, and included a single billing period (August 31, 2007 to October 1, 2007) when almost every tenant's bill was reduced, resulting in an aggregate refund for that billing period alone, before application of interest, of $17,309.38.[33] We are now requiring additional small refunds for overbilling found, during review of the appeal, to have occurred during

[32] Similarly, our statement in Riverview II (see n. 22, above), at p. 23, that "limitations on submetering, if any, created by ... leases are a contract issue which we see no need to address," does not indicate that an owner is free to ignore the requirements of a Submetering Order.

[33] The extensive refunds during 2007 appear to have resulted in large part from estimated billing during that year, a problem that for the most part did not recur during the period reviewed.

2009. The appeal does not show a basis for additional refunds for periods preceding 2009.

Notwithstanding that tenants have been, or will be, provided with refunds to which the record before us shows them to be entitled, the owner's failure to comply properly and in a timely manner with the 2001 Submetering Order is a serious matter. Such failure, like the failure to timely comply with any provision of a submetering order, could subject the submeterer to a penalty pursuant to PSL §25. Under the circumstances of this case and its timing, and due to the fact that our complaint process has already secured substantial refunds to tenants, it is highly unlikely that a PSL §25 penalty would be needed here to vindicate the integrity of our order or our submetering program. Therefore, based on the facts of this case, the owner here should not be exposed to a penalty action pursuant to a PSL §25 for its failure to timely include the specified provisions in tenant leases. Nevertheless, this owner and other submeterers, should be aware that, in the future, even a violation of a submetering order which causes no financial harm or penalty to tenants or which is based on a failure to timely comply and is subsequently addressed by a later, untimely action, may, in appropriate circumstances, be the basis of a penalty action against the submeterer pursuant to PSL §25.

CONCLUSION

To assure that all aspects of this case have been properly addressed, the complaint file has been thoroughly reviewed. We determine that the owner overbilled 43 tenants during one billing period during 2009 and has not to date corrected that overbilling; therefore, we will direct refunds to those tenants.

Within 30 days of this determination, the owner is directed to:

1. Rebill the 43 tenants of the apartments associated with the meter numbers identified on the two pages of Appendix 2 (23 meter numbers on page 1, and 20 meter numbers on page 2), and refund each overpayment, with interest as of the date of overpayment, at the rate required by our regulations (16 NYCRR §145.3).[34]
   a. Refunds to current tenants.
      For tenants due refunds who continue to reside at Hazel Towers, the total refund amount (including interest) must be paid to the tenant by check, except that the total refund amount may be credited to the tenant's electric account if that refund amount (including interest) meets one or both of the following conditions:
      i. The amount is less than the overdue balance of the tenant's electric account as of both the date of this determination and the date by which the refund must be paid; and/or
      ii. The amount is less than $10.
   b. Refunds to tenants no longer residing at Hazel Towers.
      i. If the tenant's current address is known or can be determined from the Tenants Association or from available directories, a check shall be sent to the tenant; however, in the case of a tenant who had an unpaid electric balance when

[34] No refunds are required to SCRIE tenants or with respect to any apartment not rented during the relevant billing period to a submetered tenant.

his or her lease expired, no check shall be sent except to the extent that the rebilled amount exceeds the unpaid balance.

ii. If the tenant's current address is unknown and cannot be determined by the foregoing means, the owner shall so indicate on the documentation required by clause 3 below.

2. Provide a list to the Acting Secretary to the Commission and to the Tenants Association, showing the meter numbers, apartment numbers, and names of all tenants entitled to refunds or credits, and indicating meter numbers for which a refund would have been due except that the relevant apartment was occupied by a SCRIE tenant or was not rented to a submetered tenant; the refund or credit amounts (including interest); the date on which the credit was applied or the date on which a check was sent to the tenant; and indicating which refunds could not be provided because the tenant no longer lives at Hazel Towers and no current address is available.

Therefore, the Tenants Association's appeal is granted in part and the informal hearing officer's decision is reversed in part.

CASE 10-E-0356 **APPENDIX 1**

Challenged August 4, to September 2, 2009 Bills

			OWNER BILLING		TENANTS ASSOCIATION (TA) PROPOSED BILLING		CON ED
Row	Meter No.	Usage in kWh	Owner rate cap calculation	Owner actual charge-bulk rate + $4-fee	TA rate cap	TA overcharge	SC 1 rate
1	6	1041	$235.34	$223.83	$206.30	$17.53	$232.65
2	16	1148	$258.13	$246.43	$226.08	$20.35	$255.14
3	18	1854	$408.54	$395.52	$356.58	$38.94	$403.54
4	106	1310	$292.65	$280.64	$256.02	$24.62	$289.19
5	112	1402	$312.25	$300.07	$273.03	$27.04	$308.53
6	174	1049	$237.04	$225.52	$207.78	$17.74	$234.32
7	204	1003	$227.24	$215.81	$199.27	$16.54	$224.66
8	218	1429	$318.00	$305.77	$278.02	$27.75	$314.22
9	224	1029	$232.78	$221.30	$204.08	$17.22	$230.11
10	228	1238	$277.31	$265.43	$242.71	$22.72	$274.06
11	230	1025	$231.93	$220.45	$203.34	$17.11	$229.26
12	232	1022	$231.29	$219.82	$202.79	$17.03	$228.65
13	234	1309	$292.43	$280.43	$255.84	$24.59	$288.97
14	240	1447	$321.83	$309.57	$281.35	$28.22	$317.98
15	244	1638	$362.52	$349.90	$316.65	$33.25	$358.13
16	266	1346	$300.31	$288.24	$262.68	$25.56	$296.76
17	272	1197	$268.57	$256.78	$235.13	$21.65	$265.44
18	274	1056	$238.53	$227.00	$209.07	$17.93	$235.79
19	276	1145	$257.49	$245.79	$225.52	$20.27	$254.49
20	298	1344	$299.88	$287.82	$262.31	$25.51	$296.34
21	322	1032	$233.42	$221.93	$204.64	$17.29	$230.75
22	324	1025	$231.93	$220.45	$203.34	$17.11	$229.26
23	344	1031	$233.21	$221.72	$204.45	$17.27	$230.54
24	412	1035	$234.06	$222.56	$205.19	$17.37	$231.38
25	430	1103	$248.55	$236.92	$217.76	$19.16	$245.69
26	448	1004	$227.46	$216.02	$199.46	$16.56	$224.86
27	464	1042	$235.55	$224.04	$206.48	$17.56	$232.85
28	486	1077	$243.01	$231.43	$212.95	$18.48	$240.22
29	496	1218	$273.04	$261.21	$239.02	$22.19	$269.86
30	508	1033	$233.64	$222.14	$204.82	$17.32	$230.96
31	566	1019	$230.65	$219.19	$202.23	$16.96	$228.01
Total:			$8,228.58	$7,863.73	$7,204.88	$658.85	$8,132.61

CASE 10-E-0356 **APPENDIX 2**

February 4, 2009 to March 6, 2009 Overbilling

A. Owner's original billing of 23 tenants, showing prior reduction to owner's verions of rate cap, and refunds now required because the rate cap was improperly calculated.

			OWNER'S BILL CALCULATIONS				FURTHER CORRECTION REQUIRED BASED ON CON ED'S ACTUAL SC 1 RATE	
Row	Meter no.	Usage kWh	Owner- rate cap calculation	Owner- bulk charge + $4 fee	Correction of overbilling	Amount billed by owner	Bill at Con Ed SC1 rate	Refund due: owner's rate cap less SC1 bill
1	16	458	$96.48	$100.48	$4.00	$96.48	$94.41	$2.07
2	74	448	$94.72	$98.72	$4.00	$94.72	$92.70	$2.02
3	106	556	$113.73	$117.73	$4.00	$113.73	$111.21	$2.52
4	108	459	$96.66	$100.66	$4.00	$96.66	$94.60	$2.06
5	112	456	$96.13	$100.13	$4.00	$96.13	$94.09	$2.04
6	228	437	$92.79	$96.79	$4.00	$92.79	$90.81	$1.98
7	234	773	$151.92	$155.92	$4.00	$151.92	$148.46	$3.46
8	240	446	$94.37	$98.37	$4.00	$94.37	$92.37	$2.00
9	244	698	$138.73	$142.73	$4.00	$138.73	$135.56	$3.17
10	246	730	$144.35	$148.35	$4.00	$144.35	$141.09	$3.26
11	252	432	$91.90	$95.90	$4.00	$91.90	$89.95	$1.95
12	266	437	$92.79	$96.79	$4.00	$92.79	$90.81	$1.98
13	284	481	$100.53	$104.53	$4.00	$100.53	$98.37	$2.16
14	298	602	$121.83	$125.83	$4.00	$121.83	$119.12	$2.71
15	328	487	$101.59	$105.59	$4.00	$101.59	$99.39	$2.20
16	336	689	$137.14	$141.14	$4.00	$137.14	$134.05	$3.09
17	362	462	$97.19	$101.19	$4.00	$97.19	$95.11	$2.08
18	464	529	$108.98	$112.98	$4.00	$108.98	$106.60	$2.38
19	486	465	$97.72	$101.72	$4.00	$97.72	$95.63	$2.09
20	518	442	$93.66	$97.66	$4.00	$93.66	$91.69	$1.97
21	522	500	$103.88	$107.88	$4.00	$103.88	$101.63	$2.25
22	550	541	$111.09	$115.09	$4.00	$111.09	$108.65	$2.44
23	554	454	$95.77	$99.77	$4.00	$95.77	$93.75	$2.02

CASE 10-E-0356 **APPENDIX 2**

B. Refunds required in cases of 21 additional tenants because of improper calculation of the rate cap.

	OWNER'S BILLING					REFUND REQUIRED BASED ON CON ED'S ACTUAL SC 1 RATE	
Row	Meter no.	Usage kWh	Owner's rate cap calculation	Amount billed - bulk charge+$4-fee		Bill at SC 1 rate	Refund due: owner's billing less correct SC 1 billing
1	6	394	$85.22	$84.37		$83.45	$0.92
2	22	386	$83.81	$82.74		$82.07	$0.67
3	30	367	$80.46	$78.86		$78.82	$0.04
4	84	370	$81.00	$79.47		$79.32	$0.15
5	86	374	$81.70	$80.29		$80.01	$0.28
6	102	378	$82.40	$81.10		$80.68	$0.42
7	130	385	$83.64	$82.53		$81.91	$0.62
8	134	406	$87.33	$86.81		$85.51	$1.30
9	140	401	$86.44	$85.80		$84.67	$1.13
10	208	418	$89.44	$89.26		$87.56	$1.70
11	222	373	$81.53	$80.08		$79.84	$0.24
12	230	418	$89.44	$89.26		$87.56	$1.70
13	288	391	$84.69	$83.76		$82.94	$0.82
14	302	374	$81.70	$80.29		$80.01	$0.28
15	414	369	$80.82	$79.27		$79.15	$0.12
16	426	380	$82.75	$81.51		$81.07	$0.44
17	430	421	$89.97	$89.87		$88.09	$1.78
18	484	371	$81.17	$79.68		$79.50	$0.18
19	494	377	$82.22	$80.90		$80.53	$0.37
20	510	403	$86.80	$86.20		$85.00	$1.20