STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 14-E-0484 – In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures—Appeal by Complaining Submetered Tenants of the Informal Decision Rendered in Favor of Riverview Redevelopment Co., L.P. (918395).

COMMISSION DETERMINATION
(Issued and Effective April 21, 2015)

COMPLAINT: Submetered Billing

DISPUTED AMOUNT: $0

PERIOD INVOLVED: August 2008 – November 2013

SUMMARY

The Commission has received an appeal, filed on behalf of Complaining Submetered Tenants (Tenants or complainants) by their attorney,[1] from a decision dated October 7, 2014, denying them an informal hearing on issues concerning submetering of residential electric service by the owner of their building, Riverview Redevelopment Co., L.P. (Riverview Redevelopment or owner).[2] The building at issue (Riverview or building) is a rent-stabilized 382-unit apartment building, located on Sedgwick Avenue, in the Bronx. An informal hearing was denied on the

[1] Complainants signed petitions authorizing Garrett Wright, Esq. of the Urban Justice Center to represent them in filing complaints with both the building owner and then the Department of Public Service's Office of Consumer Services (OCS) regarding submetering of electricity at a building on Sedgwick Avenue in the Bronx. Mr. Wright continues to represent complainants.

[2] On appeal, Riverview Redevelopment has been represented by Adam Conway, Esq., Couch White LLP, since October 2014. The owner was represented from August 2009 through February 2010, by Schechter & Brucker, PC. From March 23, 2010, through August 2010, it was represented by Peter V. K. Funk, Jr., Esq. and Phyllis Kessler, Esq. of Duane Morris LLP. Apparently, after that Riverview was again represented by Schechter & Brucker until October 2014.

basis that a hearing officer could not provide the requested relief to complainants.[3]

For the reasons explained below, we modify the decision denying complainants an informal hearing, and grant relief in two respects. We do not remand the matter because the issues requiring decision or clarification are ones properly (and at this point more efficiently) resolved by the Commission, based on the parties' written submissions.

BACKGROUND

The 2007 Submetering Order and 2008 initiation of submetering.

In September 2006, Riverview Redevelopment petitioned the Commission for permission to submeter electricity (previously master metered) to the building's residential tenants; the electric service was not and is not used for heating purposes. By order[4] (Order or Submetering Order) issued April 2, 2007, the Commission granted approval for submetering. The Order required that regulated rents be reduced[5] and other specified conditions met, including that tenant bills "be based

[3] Section 12.5(a)(2) of 16 NYCRR states, "A request for an informal hearing may be denied if the relief sought by the customer or utility is beyond the power of the informal hearing officer to provide."

[4] Case 06-E-1179, Petition of Herbert E. Hirschfeld, P.E. to submeter electricity at Riverview, Order Granting Approval to Submeter.

[5] In February 2008, the owner received approval from the United States Department of Housing and Urban Development (HUD) for conversion from master-metered electricity to submetering, and HUD provided the schedule for the amount by which each apartment's rent would be reduced, because electric service would no longer be rent-included. Subsequently, in June 2012, the owner notified building residents that HUD had lowered these reductions, effectively raising rents.

on the actual rate charged by Con Edison" (emphasis added),[6] and may not exceed "the Con Edison rate for directly metered residential electric service" (the "rate cap"); and notice to tenants that "the Home Energy Fair Practices Act (HEFPA) will be adhered to."[7]

Actual billing for electricity based on readings of tenants' submeters began with the September 2008 bill received by tenants in October 2008. In accord with the Submetering Order's explicit requirement, "shadow" bills – were provided to tenants in August and September 2008, for electric service provided in July and August respectively) before actual submetered billing began.[8]

2009 Complaints from Tenants

By letter dated March 10, 2009, Tenants complained to Grenadier Realty Corp., which managed the building for the

[6] The building is billed for overall service to its residential apartments under Con Edison's Service Classification (SC) No. 8, permitting redistribution of electricity to residential tenants by a building owner in a multiple dwelling. The Submetering Order requires that charges paid by tenants "be based on the actual rate charged [the owner] by Con Edison." Consistent with the statement in the September 21, 2006 Application to the Commission "to Submeter Electricity at Riverview, Bronx, New York" (Exhibit 3 to owner's December 9, 2009 response to OCS, at p. 3), that the "monthly cost of electricity (in cents per kWh) to the tenants" would be calculated by dividing "the total building Con Edison charge (computed at the SC-8 rate) by the total building consumption (kWh) as measured by Con Edison," the owner confirmed, in a December 9, 2009 response to OCS (p. 21), that Riverview residents benefit from "the lower bulk rate classification passed through to the submetered tenant."

[7] Submetering Order, p. 3.

[8] The Submetering Order, at p. 3, states: "Shadow billing will be provided to tenants prior to actual billing in order to familiarize them with electric costs based on their individual consumption patterns and to encourage energy conservation efforts."

owner, alleging noncompliance with the Submetering Order.[9] The letter asserted that, in violation of the Submetering Order and/or specified provisions of PSL Article 2 (Home Energy Fair Practices Act [HEFPA]) and/or the Commission's regulations implementing HEFPA (16 NYCRR Parts 11 and 12), the building owner failed to:

1. properly notify tenants of the intent to submeter;
2. include information about submetering and provisions of HEFPA in tenants' leases;
3. provide tenants with proper shadow billing statements;
4. accurately measure and/or report tenants' electricity usage;
5. comply with the 2007 Submetering Order's rate cap;
6. discontinue separate monthly charges for air conditioning; and
7. comply with HEFPA and its implementing regulations (specifically 16 NYCRR §§11.16, 11.11, 11.17, and 11.20).

In a more detailed letter dated July 20, 2009, complainants contacted the Department of Public Service's Office of Consumer Services (OCS) seeking remediation of the building owner's asserted noncompliance with the 2007 Submetering Order.[10]

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[9] A four-page petition with 77 signatures of building residents (specifying apartment numbers) was submitted with the letter. Fifteen tenants signed twice.

[10] Complainant's July 20, 2009 letter to OCS included another petition, specifying that the undersigned tenants authorize the Urban Justice Center "to be our representatives in the filing of a complaint with the ... Commission against Riverview Redevelopment ... and Grenadier Realty Corp. regarding problems with electric submetering at ... [Riverview]." Ninety-seven residents' signatures and apartment numbers were provided. Of the 97 residents, 17 signed the petition more than once; when the duplicate signatures, and also signatures of persons who had also signed the first petition, are subtracted, 58 additional tenants signed this second petition. In total, the two petitions included signatures from approximately 120 different residents of Riverview.

The July 20, 2009 letter stated that the owner:

A. did not properly notify tenants of the submetering proposal;

B. "thwarted the [Submetering] Order and HEFPA" by suing tenants in housing court for nonpayment of electric bills;

C. violated the Submetering Order's requirements for

1. provision of information about submetering and HEFPA in tenants' leases,

2. provision of "shadow billing" to familiarize tenants with electric costs and encourage conservation efforts,

3. serving Spanish-speaking tenants;

D. violated the Submetering Order's requirements for just charges and rates by

1. failing to accurately measure and/or report tenants' electric usage, and failing to make meter inspections to be sure meters are properly installed or functioning,

2. failing to charge tenants proper rates (by not making it possible to know whether their electric charges are below the rate cap of Con Edison's rate for directly metered residential service) and failing to reduce rates for tenants who would qualify for Con Edison's low-income program,

3. charging excessive late payment charges ($10 flat fees) in violation of the Commission's regulation on late payment charges, and by billing late payment charges sooner than is permissible under that regulation, and

4. failing to discontinue separate monthly charges for air conditioning;

E. violated complainants' rights by failing to provide various protections required by 16 NYCRR Part 11.

Response by owner

By letter dated September 3, 2009, the owner claimed it had responded to each individual submetering complaint and resolved all such complaints (unless access to the apartment had been denied), and that complainants' attorney, by letter dated August 18, 2009, refused to provide information about individual

complaints to the owner (indicating his view that this was unnecessary because the Commission would investigate).

By letter dated January 8, 2010, complainants argued that Riverview Redevelopment was improperly seeking to evict tenants in New York City Housing Court, in violation of Commission precedent, citing the Commission's "September 17, 2009 Roosevelt Landings decision."[11]

OCS request for information from owner and owner's response

After further letters giving the respective parties' positions, on March 12, 2010, OCS sent requests for copies of material or provided comments or instructions to Riverview Redevelopment regarding ten issues:

1. Owner to provide copies of all notifications to tenants of submetering (except for May 25, 2007 and May 9, 2008 documents already in staff's possession).
2. Owner to document authorization to treat electric charges as rent (no authorization for such treatment was included in the Submetering Order).
3. Eviction not permitted for nonpayment of submetered electric charges "unless every HEFPA protection has been afforded the tenant."
4. Riverview's "HEFPA [lease] Rider" does not conform to the Submetering Order's requirements and has other defects; owner to provide draft form Rider for review.
5. Owner violated the Submetering Order by requiring payment of shadow bills.
6. Any administrative fee charged for submetered electricity must be identified on tenant's bill, and the sum of the electric charges plus the fee may not exceed the rate cap (Con Edison's charge for direct metered service).
7. The owner must inform tenants of criteria for Con Edison's low income program; and

[11] This was a reference to Cases 08-E-0836, et al., Petition of Frawley Plaza, LLC – Submetering, Order Denying in Part and Granting in Part Petitions for Rehearing and Establishing Further Requirements (issued September 17, 2009), which comprehended four cases including that of Roosevelt Landings.

8. Any air-conditioning charges billed since submetering began must be refunded to the tenant, and documentation thereof provided to staff.

Riverview responded on July 26, 2010 (with a copy to complainants the following day), and submitted a supplemental response to both OCS and complainants on August 11, 2010, providing further information on two of the issues (items 1 and 6) in its original response. The combined response was as follows:

1. Notification to tenants of submetering. Copies of five notices to tenants concerning submetering were provided.

   One additional tenant notification (dated February 14, 2007) was provided by the August 11, 2010 supplemental response.

2. and 3. Treatment of submetered electric payments as rent; and availability of "summary proceeding," including eviction, if electric bills are not paid. Relying on the Commission's statement in Case 08-E-0439, Petition of Riverview II Preservation, Order Denying Petition for Rehearing (issued June 25, 2010), pp. 23-24, that what is prohibited is "any judicial action" against a submetered tenant "until the submeterer has first exhausted all of the remedies available under HEFPA," the owner says it "will provide HEFPA protections before pursuing any eviction based upon non-payment of utility bills." Although the Submetering Order did not say electric charges would be treated as additional rent, the owner asserts the application did, and contends, because the Order approved the application "as recommended," that such treatment of electric payments was approved.[12]

4. Need to correct HEFPA Lease Rider. Riverview proposes to use forms for HEFPA Annual Notification and for HEFPA Lease Rider (both used by Riverview II in connection with a different building); OCS has approved the requested use of the HEFPA Annual Notification form, and if it approves Riverview's use of the HEFPA Lease Rider, Riverview will adopt it.

5. Shadow billing. The owner, claiming it was not legally required to do so (though shadow billing was required by

[12] The owner's understanding of "approved as recommended," was incorrect. See p. 18, below.

its Submetering Order, see page 3, above), says it "voluntarily provided shadow bills for the months of August and September 2008 [sent to tenants in September and October, respectively]," which certain tenants paid, "though not required to do so"; the owner maintains that "[a]ll such amounts ... have been refunded to tenants."

6. Inclusion of an administrative fee on a tenant's submetered bill. A copy of the form utility bill for Riverview tenants is stated to be attached as Appendix B, but in fact no such form is attached.[13]

   The August 11, 2010 supplemental response attaches, as Appendix B, an example of a bill format used for Riverview residents. The example does not indicate that any administrative charge is included or is charged.

7. Low income rate. The owner contends that submetered tenants are not entitled to an equivalent low income rate, arguing that it is only Con Edison's SC No. 1 service charge (at the relevant time, $15.76) that could be reduced for customers eligible for the low income rate to $7.26, and that since the tenants are billed at SC No. 8, which lacks any "service charge," no such reduction is applicable.

8. Air-conditioner charge. The owner admits it improperly (since this charge was to be discontinued once submetering began) continued charging a few tenants the air-conditioner charge after submetered billing began, but says these tenants' accounts were credited to eliminate such charges.

9. Individual Tenant Issues:

   9.1 Ms. Miller – shadow billing; meter accuracy.

   The owner states it provided information by letter dated October 29, 2009, and a credit of $758.55 was provided to the tenant on April 27, 2009, for submetering charges for August and September 2008 (shadow bills). In response to claims by the tenant that the meter inaccurately recorded usage during

[13] Correctly referenced, the form bill should have been identified as Exhibit D, for which there exists only a coversheet (following Exhibit C, and preceding Exhibits E-1 and E-2, all of which were provided); the coversheet states, below the heading, Appendix D, "FORM OF UTILITY BILL PROVIDED TO RIVERVIEW TENANTS," followed by the bracketed phrase "To be provided."

these periods, the meter was later tested and shown to be recording accurately.

9.2 Ms. Lucas – claimed meter inaccuracy.

The owner states a meter test was done October 21, 2009, staff so informed by owner's letter of October 29, 2009, and meter was found to be recording accurately. A copy of the test report is attached.

Tenants did not submit any comments on Riverview's submissions.

Initial staff decision

Thereafter, the case remained open pending preparation by staff of an initial decision, pursuant to 16 NYCRR §12.4.(a).[14] In early October 2013, a telephone call from an attorney saying that he no longer represented Riverview (see note 2, above) led staff to contact the management company for Riverview, which said all issues had been resolved. After a phone message was left for complainants' attorney on October 7, 2013, and a letter was sent to him on October 11, 2013, complainant's attorney responded on October 30, 2013, that the matter had not been resolved.

By letter dated November 5, 2013, an OCS staff member then issued an initial decision concluding that "Riverview has come into compliance with all the stipulations presented in ... [the 2007 Submetering Order]"; the decision also "determined that Riverview has provided all HEFPA protections to its tenants," and stated the following conclusions for the eight issues it indicated had been presented:

[14] The delay that followed is not explained in the record.

1. Issue: adequacy of tenant notification of submetering. Conclusion: the owner provided copies of several notifications distributed to tenants.[15]

2. Issue: Whether the owner improperly treated electric charges as additional rent, in seeking eviction. Conclusion: Regardless of the fact that the Submetering Order in this case did not establish that submetered electric charges might be treated as additional rent, a submeterer may evict a tenant for nonpayment of submetered electric charges, but only after having provided the tenant with all protections under HEFPA (referring to both 16 NYCRR Parts 11 and 12).

3. Issue: Noncompliance with HEFPA. Conclusion: the owner agreed to provide all HEFPA protections to tenants before pursuing eviction (see owner's July 26, 2010 response to staff), and the owner's current Annual Notice of Rights and Procedures, and its Electric Submeter Lease Rider, comply with HEFPA.

4. Issue: Failure to shadow bill tenants prior to commencing submetered billing (the actual allegation was improper receipt of actual payments as a result of shadow bills). Conclusion: Although the owner received payments from some tenants of amounts shown on the two shadow bills, the owner did not seek payment of shadow bills and refunded all such payments.

5. Issue: Failure to separately identify an administrative fee on its statements. Conclusion: The owner does not, and is not required to charge an administrative fee.[16]

6. Issue: Whether the owner improperly assessed air conditioner charges on tenants' accounts. Conclusion: The owner inadvertently charged some tenants the air-conditioner fee after submetering began, but all such accounts have been credited for the improper charges.

7. Issue: Individual tenant complaints. Decision: Because documents provided by the Tenants included

[15] February 20, 2007 notice of intent to submeter and invitation to participate in a meeting); December 21, 2007 notice regarding HUD approval of submetering; May 25, 2007 Notice of Intent to Submit a Proposal to HUD dated May 25, 2007; February 14, 2008 Notice Of Approval of Submetering; March 25, 2008 Notice of Adjournment of Submetered Billing; and May 9 2008 Supplemental Notice of Approval of Submetering.

[16] The owner no where stated that it did charge such a fee and Tenants do not allege that it did.

> "numerous duplicate signatures and no specific documentation with supporting history for individual complaints," general concerns were investigated, while "individual complaints" were not.

Staff informed Tenants' attorney by telephone on November 5, 2013, that if any tenant was still "having issues," such a tenant should "open a case" on his or her own behalf.

By letter dated November 12, 2013, the owner provided, in response to a staff request, a copy of the 2013 Annual Notification of Rights (provided to all Riverview tenants on August 29, 2013) and copies of the 2012 and 2013 HEFPA riders, explaining that in 2012 the 2012 rider served a notification to new tenants of their HEFPA rights. The letter also explained that:

> All Riverview tenants, both new and existing, were required to sign the attached HEFPA lease rider in 2009 and were thereby notified of their HEFPA rights at that time. Since 2009, subsequent lease renewals for existing tenants did not have the HEFPA lease rider attached, but incorporated by reference all prior lease terms, including the HEFPA lease rider.

In its November 12, 2013 letter, the owner also requested that the complaint be closed, saying that it had believed the case was closed in 2010, and that there had been no tenant complaints to the owner "regarding submetered service ... since 2010."

By letter to OCS dated December 3, 2013, complainants appealed the initial decision and requested an informal hearing, asserting that: the building owner was still not in compliance with HEFPA and the 2007 Submetering Order; the practice of evicting tenants for nonpayment of submetered electricity charges was inconsistent with prior Commission decisions; and prior submissions by complainant did, in fact, include billing and other information for several individual tenants and the decision by OCS staff not to consider individual complaints was, therefore, improper. The letter (at page 4) also stated that utility bills provided by Riverview do not include necessary

information, preventing customers from knowing "if they are being charged in compliance with the law," and submitted an actual bill, which was a single monthly statement for rent and utility charges, lacking any information about the amount billed for "utility charge," other than the dates of the period to which the bill applies, and failing to show any "utility" arrears separate from rent arrears. The bill shows use of a flat $10 fee, applicable, it appears, to combined rent and utility arrears.[17]

By letter dated October 7, 2014, an informal hearing was denied on the basis that an informal hearing officer would be unable to investigate the concerns of individual tenants which were not previously brought before the building owner or OCS. The October 7, 2014 letter also informed complainant that records showed "generic" issues had been resolved and therefore required no further action.

ISSUES ON APPEAL

By letter dated October 22, 2014, Tenants appeal the decision denying an informal hearing, arguing that it is erroneous for the reasons summarized here:

1. Riverview is not permitted, under the Commission's December 18, 2012 Memorandum and Resolution Adopting Residential Electric Submetering Regulations (issued December 18, 2012, in Case 11-M-0710) to evict tenants for nonpayment of utility charges, and the Commission has prohibited submeterers from classifying utility charges as "additional rent."[18] Riverview

[17] The relevant tenant signed both petitions submitted on behalf of the Tenants in 2009.

[18] See Case 11-M-0710, Electric Submetering Regulations, 16 NYCRR Part 96, Memorandum and Resolution Adopting Residential Electric Submetering Regulations (issued and effective December 18, 2012), p. 32: "[I]n this order, we determine that when a premises is submetered, electric charges may not be treated by the submeterer as 'additional rent.'"

continues to require tenants to sign leases defining utility charges as "additional rent" (a copy of such a lease, dated April 6, 2012, is attached). Documentation submitted by Riverview to staff on July 27, 2010 (Appendix C, HEFPA Annual Notification) shows that it believes it may evict tenants solely for nonpayment of electric charges if it provides HEFPA protections first. The Submetering Order for Riverview nowhere authorizes eviction for failure to pay electric charges.[19]

2. Riverview did not comply with HEFPA for at least two years after submetering was implemented. (Staff's November 5, 2013 initial decision says that it was not until July 26, 2010 that Riverview provided assurances that it would give tenants HEFPA protections. Staff's March 12, 2010 directive stated that the existing HEFPA Rider did not conform to the Submetering Order.) Complainants seek refunds of either all electric charges paid by tenants (or alternatively all such payments in excess of the utility allowance for a given tenant's unit) from August 1, 2008, to either the date of the Commission's determination of their appeal or to July 26, 2010 (when Riverview agreed to provide all HEFPA protections).

3. Riverview is still not in full compliance with HEFPA: it has not notified tenants that they may request bills in Spanish; electric bills still do not comply with 16 NYCRR §11.16's requirement to "adequately explain charges in clear and understandable form and language," nor do they include all specific information required by the subdivisions of this rule; and an improper flat $10 late payment charge is imposed for overdue electric charges.

[19] Tenants also object to reduction in the utility allowance originally established by HUD (compared to the allowance schedule provided by HUD in February 2008, which was used to reduce rents when submetering commenced). The Commission has no authority regarding this issue.

4. Riverview's February 14, 2007, notice to tenants of intent to submeter did not comply with 16 NYCRR Part 96, because a letter dated February 14, 2007, submitted to OCS August 11, 2010, did not inform tenants in advance that Riverview was going to apply to the Commission for submetering approval (the application was filed September 21, 2006), did not provide "an invitation to comment to the commission" about Riverview's application, did not even acknowledge that an application had already been made to submeter, and did not provide the information required about the type of system to be installed, or the details of the complaint procedure and tenant protections that would be provided.

5. Tenants also appeal the denial of an informal hearing on individual complaint issues, stating that they first sent a letter dated March 10, 2009, to the owner, which raised "all of the issues" that Tenants then presented to OCS in their July 20, 2009 letter. They state that their attorney did submit bills and other information regarding complaints of individual tenants and object to OCS's failure to consider any such complaints at the analysis stage (prior to issuance of staff's initial decision) or at the informal hearing stage (prior to issuance of the written denial of an informal hearing.

DETERMINATION

The initial issue here is whether complainants' request for an informal hearing was properly denied. Section 12.5(a)(2) of 16 NYCRR states: "A request for an informal hearing may be denied if the relief sought by the customer or utility is beyond the power of the informal hearing officer to provide." Pursuant to the same regulation, the recipient of such a decision may appeal it pursuant to §12.13 (which permits appeal of an informal hearing decision). In this instance, the reasons for concluding that no relief could be provided to complainants by an informal hearing officer were, at least in

part incorrect, for the reasons discussed below. However, the issues presented are ones that would not benefit from a remand and are appropriately resolved in this determination, based on the parties' submissions.

1. Whether eviction is precluded as a remedy for nonpayment by a residential occupant of submetered electric charges.

The informal hearing decision does not address this argument. Following receipt of a negative November 5, 2013, initial staff decision on their complaint, complainants submitted a letter dated December 3, 2013, seeking an informal hearing. This was the first of five main issues presented. Ultimately we approve the conclusion reached at each level on this issue, but complainants' December 3, 2013 letter seeking an informal hearing called for an answer, and should not have been rejected with no explanation or even acknowledgement that an argument had been made.[20]

[20] The December 3, 2013 letter to staff argued that eviction was precluded in response to nonpayment of electric charges based on a September 17, 2009 Order (Denying in Part and Granting in Part Petitions for Rehearing and establishing Further Requirements) in Cases 08-E-0836, et al., Petition of Frawley Plaza, LLC, (issued September 17, 2009)(Roosevelt). That order did state that submeterers were not free to have tenants evicted based on nonpayment of submetered electric charges. However, in an order issued five months later (February 18, 2010) in Case 08-E-0439, Petition of Riverview II Preservation, the Commission, at pp. 27-28, concluded that given the limited options available to a building owner if its submetering equipment did not permit termination of service to an individual apartment, recourse to civil remedies based on nonpayment of submetered electric charges (including eviction) would, indeed, be permitted - but only after all HEFPA protections available had been provided to the submetered tenant. Subsequent orders in submetering cases have maintained this position. See Case 08-E-0439, Petition of Riverview II Preservation, Order Denying Petition for Rehearing (issued June 25, 2010), p. 23, reiterating that "our February 2010 Riverview II Order prohibits any judicial action by Riverview II until the submeterer has first exhausted all of the remedies available under HEFPA," and saying explicitly (p. 24) that "[p]ursuant to HEFPA, no action based on the non-payment of (continued)

On appeal, Tenants argue that language in the Commission Memorandum and Resolution[21] (Resolution) adopting the current submetering regulations (Part 96 of 16 NYCRR, effective January 18, 2012) precludes eviction of submetered residential tenants at this time. The Resolution, beginning on page 28, discusses the requirement that submetering systems - installed after 2016 - "be capable of service termination to individual units," and states that, until such systems are installed:

> residents in submetered premises are entitled to, and submeterers are obligated to show they have provided, all of the protections HEFPA prescribes ... [including, among others, proper notice and the offer of an affordable deferred payment agreement based on the occupant's financial circumstances] before any civil remedy is enforced for failure to pay electric charges.[22]

The Resolution then notes that:

> Once submeterers became subject to HEFPA, ... submetered end-users became entitled to HEFPA's protections and the two areas of law – Real Property Law and the Public Service Law and regulations – must be reconciled.[23]

The point is then made, that where a submeterer, like a utility, is providing electric service to residential occupants, the Commission's aim is to treat "submeterers like utilities when submeterers are owed electric service and require that service termination, rather than special proceedings, be the remedy sought when a submetered end-user fails to pay electric charges."[24]

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the underlying charges [the type of proceeding that may lead to eviction] could occur until these HEFPA remedies were exhausted."

[21] Case 11-M-0710, Residential Electric Submetering Regulations, Memorandum and Resolution (issued January 18, 2012).

[22] Resolution, p. 29.

[23] Id., pp. 30-31.

[24] Id., p. 31.

Until submeterers have a system capable of terminating an individual unit's electric service, however, it is "within the parameters of HEFPA" to permit "other civil remedies" (as opposed to termination of submetered service) to be employed by submeterers, provided this occurs only after "all HEFPA protections have been provided"[25]; however, "once submetering systems are installed after 2016 that are capable of service termination, no use of the alternative civil remedies (including a summary proceeding to evict a residential tenant based on nonpayment of rent) will be permissible in response to nonpayment of submetered electric charges.

Complainant relies on language in the next paragraph of the Resolution, which after saying courts have disallowed "cost recovery claims" for amounts "unrelated to rent or called 'additional rent,'" states that only leases defining electric charges as "additional rent" may "be used by a landlord to retake possession of leased premises"; complainant also relies on a further statement that "in this order, we determine that when a premises is submetered, electric charges may not be treated by the submeterer as 'additional rent.'"[26] However, the paragraph relied on immediately follows the discussion described above. That preceding discussion explicitly permits a submetering owner – where the building is not yet required to have the capability of terminating electric service to an individual unit, and only after the owner has afforded the occupant all HEFPA protections available to a directly metered customer of an electric utility prior to termination of service - to use a "civil remedy" to seek to evict an occupant who does not pay submetered electric charges. In this context, the language complainant relies on may only rationally be

[25] Id., p. 32.

[26] Id., p. 32.

interpreted as applying after the capability of disconnecting submetered electricity to individual units exists or is required to exist for a particular submetering owner.[27]

Our conclusion is confirmed by a Submetering Order issued on February 26, 2014,[28] subsequent to the Resolution. In this order, page 4, the Commission confirmed its refusal (in two earlier orders) to impose an "outright prohibition" against treating electric charges as additional rent. Instead, in light of the owner's inability to terminate submetered service due to technical limitations, the Commission declined to prohibit the owner from pursuing civil remedies for nonpayment of submetering bills, but it required that the owner provide tenants with all the procedures and protections available under HEFPA before commencing any civil proceedings. At this point, a note in the Order, specifically referring to the regulations adopted in 2012, states:

> The revised Residential Electric Submetering regulations, adopted in December 2012, recognize these technical limitations as well and require the same HEFPA procedural protections be provided tenants before civil proceedings may commence.[29]

The 2007 Submetering Order regarding Tenants' building does not provide that electric charges may be treated as additional rent. The owner's argument that approval "as recommended" of the submetering order meant that the Commission adopted everything stated in the owner's petition for permission to submeter is, of course, incorrect; approval "as recommended," means as recommended by staff, not as requested in the petition.

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[27] We note also that this language is a "determination," within the context of a "Memorandum and Resolution," adopting new regulations, and containing no ordering clauses.

[28] Case 08-E-0838, Petition of North Town Roosevelt, LLC to submeter electricity, Order Clarifying Conditions of Submetering Approval at North Town Roosevelt.

[29] Id., p. 5, n. 5.

Nevertheless, that no such language was included in the Submetering Order for this building is not relevant to what remedy is available to the owner in the event of nonpayment of electric charges during the period when the owner both lacks submetering equipment capable of disconnecting electricity to an individual apartment and is not yet required to have such equipment. For this owner, at this time, termination of a submetered tenant's electric service for nonpayment is not yet an option, nor is the owner yet required to have that capability. During this period, under our regulations for submetering in effect since December 18, 2012, the owner may – after first providing all relevant protections available to residential energy customers under 16 NYCRR Parts 11 and 12 (including, in addition to notice requirements, offering an affordable deferred payment plan consistent with the resident's financial circumstances, and meeting all requirements related to weather conditions, medical emergencies, etc.) – make use of "other civil enforcement, collection or other proceeding based on such resident's overdue electric charges,"[30] not excluding eviction.

2. HEFPA compliance issues and remedies sought by Tenants.

Tenants argue on appeal that Riverview was not in compliance with HEFPA for the first two years after submetering began and should, therefore, be required to refund all payments by submetered tenants at least until July 26, 2010 (when complainants say Riverview agreed to provide all HEFPA protections) or to require such refunds only to the extent that electric charges exceeded the utility allowance for each tenant's apartment, and be fined pursuant to PSL §25.

The repercussions of the applicability of HEFPA protections to residential submetered tenants, pursuant to PSL

[30] 16 NYCRR §96.6(h).

§53 (effective June 18, 2003) and pursuant to revisions in 16 NYCRR Parts 11 and 12 (effective June 30, 2004) were not fully appreciated by building owners and others involved in the submetering process initially. This was unfortunate, but does not appear in this case to have caused significant harm, since the building is not electrically heated and there is evidence that, indeed, tenants have overall been able to conserve electricity in response to having a price signal indicating how much service they are using. Under the circumstances here, we see no basis for the severe penalties urged by Tenants, which have been applied in cases involving obvious and dire harm, neither of which is apparent here.

Similarly, details of the original notice to tenants were inaccurate, but that fact does not warrant the penalties sought. As for the timing of the original notice, our submetering regulations did not then require coordination by the building owner of its notification to tenants of proposed submetering with the SAPA notification schedule; such coordination is now required by the new submetering regulations effective December 18, 2012.

Despite these blemishes, submetering is a desirable replacement for master metering where, as here, it enables tenants to control their use of electricity effectively. The benefits are apparent in a response to Tenants' complaints, sent by Riverview to OCS and copied to Tenants on December 1, 2009.[31] This response includes a review of bills of tenants of seven apartments identified in complainants' October 28, 2009 letter (pages 10-11) as having been billed greatly in excess of

[31] The owner has also clarified in this response that the only electric appliances provided by the building are refrigerators and energy efficient fluorescent lighting; that stoves at Riverview are gas, not electric; and that central heating for the building is powered by oil (not electricity).

the HUD utility credit for their apartments; the bills complained of totaled 12 monthly bills for the seven apartments, most for summer billing periods that were shadow billed, so tenants were not in fact responsible for the bills referred to. The owner's December 1, 2009 response (pages 5-7) finds that, in each case, all available bills for the same monthly period the subsequent year (there were two periods for which next year's bill was not yet available), showed significant reductions in use.

The owner went beyond the specific tenant complaints, noting that:

> Riverview tenants in 1-bedroom and 2-bedroom apartments (representing 334 of the 382 apartments or over 87%) now conserve electricity to the point where most pay the same or less than the amount of the utility allowance [the amount by which HUD reduced rents in response to submetering].[32]

The owner also provided a "Building-Wide Usage Timeline (kWH)"[33] showing average usage per unit for each month from June 2008 (before submetering began) through October 2009, which revealed meaningful reductions in the submetered months from June through October 2009 compared to usage during the same months in 2008.

3. Noncompliance with other HEFPA provisions.

Tenants argue that Riverview has not complied with all specific requirements under 16 NYCRR §11.16 for inclusion of specific information in bills. However, apart from the general requirement that "[e]ach utility bill to a residential customer shall provide, in clear and understandable form and language,

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[32] Owner's December 1, 2009 response, pp. 9-10.

[33] Id., Exhibit B (first page). This exhibit also includes information on building-wide electric billing from November 2008 through October 2009, showing the extent to which one-, two-, and three-bedroom apartments in the building are paying utility charges above or below the HUD utility allowance provided when submetering began.

the charges for service," the specific provisions of this section apply to "[e]ach distribution utility bill to a residential customer." A submeterer is not a distribution utility, which is defined by 16 NYCRR §11.2(a)(1)(ii) as a utility "authorized ... to lay down pipes, ... or other gas or electricity distributing fixtures, in, on, over ... streets,... or public places ...." Thus, the specific requirements of the subdivisions of §11.16 are not in themselves required, although certain information (which may or may not be included in those specific requirements) may be needed to ensure that bills are "clear and understandable." So far we do not agree that complainants have identified such missing information. Riverview does not have different Service Classification, and it has no tariff. In a given billing period, its per kWh rate applicable to submetered tenants, as we understand it, is based on its division of the price it pays to Con Edison (and to any ESCO involved) for electric service through the master meter supplying service to the tenants' apartments (and to any other areas or equipment measured by the master meter) by the number of kWh of consumption recorded during that billing period by the master meter; it then bills each tenant that dollar amount for each kWh recorded by the tenant's submeter for the same one-month period.

Tenants also argue that the owner has improperly failed to provide notice of tenants' right to Spanish-language billing and notices. Our regulations, 16 NYCRR §11.17(b), require that "[e]very utility providing service to a county where, according to the most recent Federal census, at least 20 percent of the population regularly speaks a language other than English, shall, at the request of a customer residing in such county, send this message on bills and notices in both English and such other language to such customer." To implement this requirement, §11.17(b) requires that, "[a]t least once a year,

every utility shall supply, to all residential customers in such county, a notice in such other language spoken regularly by at least 20 percent of the population in such county of the right to request messages on bills and notices in such other language."

This requirement is not limited to a distribution utility, but applies to "every utility." We conclude that PSL §53 makes this HEFPA requirement applicable to a submetering landlord, as a utility "providing service to [residents of] a county." In this case, it is appropriately implemented by the relevant utility's supplying "to all [its] residential customers in such county" the notification required. Therefore, we agree with complainants that the owner should include such a notice at least once a year.

Tenants also object to the utility's imposing a flat $10 late payment charge on unpaid electric charges. They are correct that such a charge violates 16 NYCRR §11.15(a), which limits late payment charges applicable to residential energy customers to 1½% of the unpaid charges. We agree that this is improper if indeed the late payment charge applies to electric charges (and not just to rent charges), and that this should be clarified.

4. Individual tenants' complaints.

The denial of an informal hearing on the basis that no individual complaints had been brought by individual Riverview residents to the owner or management, and then individually to staff, was incorrect. There is no such requirement. A lawyer (or a consultant or some other representative) may certainly represent a group of complaining utility customers, and may also represent individual complainants. It was not necessary, as the decision denying an informal hearing states, for each complaining individual submetered tenant to make his or her individual complaint to the building owner or to OCS; this could

indeed be done by a lawyer. (It would have been better practice for the tenants' lawyer to document which tenants, in addition to those who had already signed either petition, wished to be represented by him. However, it was appropriate, regardless, for the owner, as it apparently generally did, to respond to specific complaints voiced by that attorney, since a tenant could always disavow the complaint.)

We note also that the consumer complaint process under 16 NYCRR Part 12, does not provide for the type of building-wide investigation Tenants' or counsel appears to have expected. It is the parties who are required under our regulations to provide information to staff: the complainant must provide "basic information [about its complaint]" to OCS "so the complaint can be investigated.[34] Staff is then responsible for notifying the utility (in this case, the submeterer), which must "submit information regarding the merits of the complaint" and "should explain ... [the utility's] actions in the disputed matter and the extent to which those actions were consistent with the utility's procedures and tariff, commission rules, regulations, orders ...."[35] A complaining customer "is responsible for providing staff with <u>any facts that he or she possesses in support of his or her position</u>."[36] The investigation required of staff, consists of obtaining and reviewing information provided by the parties. Thus, issues of whether a given tenant believes his meter is malfunctioning have to be raised specifically for a named individual, who has requested representation by the person

[34] 16 NYCRR §12.1(c).

[35] Id.

[36] Id.

raising the issue – and should be raised first to building management, and then, if the issue is not resolved, to OCS.[37]

Certain issues, which apply equally to other affected customers, may of course be raised by a lawyer on behalf of individual affected customers who have requested the lawyer's representation - e.g., whether certain filings required for submetering approval and implementation were adequate. Again, such issues should be raised to the building's management first.

It does appear in this case, however, that the original individual complaints were investigated and resolved. The first such complaints, made by Tenants in a September 10, 2009 letter to the owner, concerned: (1) a dispute between the tenant in Apartment 7J and the owner involving a rent credit for a two-month bill of more than $1,000, and (2) the accuracy of the submeter recording usage for Apartment 21A. The owner's October 29, 2009 response (pages 1-3) states that despite the tenant's refusal, in both cases, to allow access for an inspection to determine each apartment's electric load, the submeters for both apartments were subsequently tested and found to be recording properly. In addition, the tenant in Apartment 7J received a credit for the payments made in response to the August 2008 and September 2008 shadow bills.

By letter dated February 25, 2010, Tenants made additional complaints to OCS asserting, without providing any specific details, that ten tenants (identified by name and apartment number) believed their meters were not functioning properly and requested an "independent PSC inspection." The letter (copied to the owner's attorney) also identified three other apartments in which tenants (who were not identified) were

[37] It was not staff's function to visit the building and seek to elicit such information in response to assertions made in Tenants' filings.

stated to possess medical equipment requiring electricity (for two apartments this is stated to be “Nebulizer machines for ... asthma,” and for the third apartment, an “Oxygen machine”). While there is no record of any response by the owner or OCS regarding individual issues raised in the February 25, 2010 letter, there is also no indication that these residents still have these concerns. In any event, any current complaints should be first presented to the building’s management, and then to OCS, with specifics, including copies of bills objected to and information about the building’s response.

CONCLUSION

To assure that all aspects of this case have been properly addressed, the complaint file has been thoroughly reviewed. We conclude that an informal hearing should not have been denied in this case, because questions were outstanding that had not been resolved and were within the hearing officer’s authority to resolve. However, because the outstanding issues are ones we may properly resolve based on the parties’ written positions we do not remand, but rather modify the informal hearing decision as follows. Regarding the four issues raised on appeal, we determine that:

1. Until the owner has the capability to terminate electricity to individual building units or is required to have that capability, it may use legal proceedings (including eviction) to collect unpaid electric charges, but may not commence any such proceeding until it has first provided every HEFPA protection available to the tenant.

2. No penalties are warranted against the building owner on account of asserted non-compliance with HEFPA requirements.

3. The owner should provide notice to all tenants once a year of the availability, upon request, of Spanish-language billing and notices, and we will require this to be done.

Similarly, a flat $10 late payment fee, which is referred to on combined rent and electric bills, may not, under our regulations, apply to unpaid electric charge (as opposed to unpaid apartment rental charges), and we will require that either the bill or the accompanying electric charge statement clarify that the $10 fee does not apply to any balance owed for electric charges.

4. No individual tenant complaint issues remain to be resolved in this proceeding.

We direct as follows:

1. Within 30 days of the date this Determination is issued, Riverview Redevelopment Co., L.P., is to submit to the Secretary to the Commission (and to provide a copy to complainants' counsel) of a plan for implementing the requirement to provide annual notice to all tenants in Spanish (spoken at home by over 30% of the population of the Bronx[38]), by informing them that, as required by Commission regulations (16 NYCRR §11.17[b]) "messages on bills and notices" will be sent in both English and Spanish to the customer, if he or she so requests, and specifying a simple method of communicating that request; the plan shall include provision for providing the first such annual notice within 60 days of issuance of this determination (with the next such notice to be provided in accord with whatever annual schedule the building owner adopts in the plan).

[38] It does not appear that any other foreign language meets the requirement of being spoken by 20% or more of the population of Bronx County.

2. Within 30 days of the date this Determination is issued, Riverview Redevelopment Co., L.P., is to submit to the Secretary to the Commission (and to provide a copy to complainants' counsel) of a plan for implementing the requirement to clarify on any bill or statement for electric service, if such a bill or statement contains a reference to a $10 late payment charge, that such a late payment charge does not apply to amounts owed for electric service; the plan shall provide for implementation to begin within 90 days of the date this Determination is issued.

3. The Secretary in her sole discretion may extend the deadline set forth in this determination, provided the request for such extension is in writing, including a justification for the extension, and filed on a timely basis, which should be on at least one day's notice prior to any affected deadline.

Therefore, complainant's appeal is granted in part and the decision denying an informal hearing is modified. Relief is granted in two respects: regarding annual notice of the availability of Spanish-language versions of messages included in bills or separate communications; and regarding the flat $10 late payment charge's inapplicability to unpaid electric charges. Otherwise, similar conclusions are reached on most issues as those reached by the hearing officer, but sometimes on different grounds.