STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on September 15, 2011

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr., dissenting
James L. Larocca

CASE 08-E-0838 – Petition of North Town Roosevelt, LLC, to Submeter Electricity at 510-580 Main Street, Roosevelt Island, New York, Located in the Territory of Consolidated Edison Company of New York, Inc.

ORDER REINSTATING SUBMETERING APPROVAL AT NORTH TOWN ROOSEVELT WITH CONDITIONS

(Issued and Effective October 28, 2011)

BY THE COMMISSION:

INTRODUCTION AND BACKGROUND

In this order, we provide for the lifting of our September 2009 stay of submetering at an apartment complex located on Roosevelt Island ("North Town Roosevelt") with conditions. North Town Roosevelt is one of four submetering petitions filed simultaneously by the Owner of these apartment complexes in 2008[1], which were then the subject of tenant petitions for rehearing in

[1] The four apartment complexes are owned by four different entities, i.e. Frawley Plaza, LLC; Metro North, LLC; North Town Roosevelt LLC; and KNW Apartments, LLC. These four entities are owned by Urban American (Owner or Petitioner or Landlord).

2009.[2] In an order issued September 17, 2009 we granted, in part, the tenant petitions for rehearing.[3] We found that a substantial majority of tenants at each of these four apartment complexes are low income households qualified to receive and receiving income-based housing assistance through the Section 8 Enhanced Voucher program administered by the New York State Division of Housing and Community Renewal (DHCR or, more recently, HCR) or by the New York City Department of Housing Preservation and Development (HPD). Further, we found that the apartments in each of the four apartment complexes are electrically-heated. To protect tenants under these circumstances, we issued a stay of our submetering approvals pending Petitioner's compliance with further conditions to submeter.

In the 2009 Rehearing Order, we directed Petitioner to submit revised submetering plans after consulting with tenants and other interested parties. These revised plans were required to address four specific, additional, conditions:

- first, that "tenants, as a group, and, in particular, low income tenants as a group [in each apartment complex] are not disadvantaged financially as a result of submetering";
- second, that the installation of energy efficiency_measures pursuant to the NYSERDA Multifamily Performance Program have been implemented;
- third, that the landlord has installed a thermostat in each apartment so the tenant can control the resistance heating units in his or her apartment; and

[2] The petitions for rehearing were filed by elected officials on behalf of their constituent tenants in these apartment complexes.

[3] See Cases 08-E-0836, 08-E-0837, 08-E-0838, and 08-E-0839 -- Petitions to Submeter Electricity, Order Denying In Part And Granting In Part Petitions For Rehearing And Establishing Further Requirements (issued and effective September 17, 2009)(2009 Rehearing Order).

- fourth, that tenants receive additional information describing the measures they may take to reduce their electricity consumption.[4]

After we issued the 2009 Rehearing Order, and in a similar, but not identical, submetering case at 47 Riverdale Avenue in Yonkers, New York (Riverview II), we described more fully the conditions under which submetering in apartment complexes of this type, i.e., multi-family dwellings heated with electric baseboard units and with a substantial number of low income tenants who receive housing assistance, would be permitted.[5] In the 2010 Riverview II Order we also adopted additional notice conditions that must be met prior to billing end-users for submetered electricity; spelled out the components of our Financial Harm Test that would be applied in that case; accepted the Landlord's proposal to conduct an extensive tenant education program to increase awareness of the energy efficiency practices that are available and which could reduce tenant electric bills if submetering were introduced;[6] and, in the circumstances of the Riverview II building, reconsidered our conclusion stated in the 2009 Rehearing Order regarding the treatment of electric charges as rent.[7]

On October 21, 2010, in response to the 2009 Rehearing Order, Petitioner filed its revised submetering plans for the four apartment complexes ("October 2010 Filing"). In the revised

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[4] 2009 Rehearing Order 25-26.

[5] Case 08-E-0439 - Petition of Riverview II Preservation, LP to Submeter Electricity at 47 Riverdale Ave., Order on Reconsideration (issued and effective February 18, 2010) (2010 Riverview II Order).

[6] 2010 Riverview II Order 16-17.

[7] 2010 Riverview II Order 15-28.

submetering plans, Petitioner sought permanent submetering approval at all four apartment complexes and addressed each of the four conditions described in the 2009 Rehearing Order, for each of the four complexes. The plans were identical in almost all respects. The most apparent difference among the submetering plans were the results reported for compliance with our Financial Harm Test, when applied to low income tenants as a group, for the Frawley Plaza, Metro North Apartments and KNW Apartments complexes as compared to the North Town Roosevelt apartment complex.

On February 22, 2011, HCR requested that we not lift the stay of submetering at North Town Roosevelt. It stated that it was in discussions with the United States Department of Housing and Urban Development (HUD) to increase the rent reductions that low income tenants would receive when submetering is introduced. HCR explained that with such adjustments, low income tenants at North Town Roosevelt would be more likely to benefit when submetering is approved.[8]

Based on the commitments Petitioner made to satisfy the conditions we set forth in our 2009 Rehearing Order and because of the favorable results on the Financial Harm Test calculations shown for the Frawley Plaza, Metro North Apartments and KNW Apartments complexes, we lifted our stay and authorized submetering at those three complexes in our August 2011 Reinstatement Order with

[8] These rent reductions are usually identified as "utility allowances" and are provided to Section 8 tenants when submetering is introduced. The utility allowances at the Frawley Plaza, Metro North Apartments and KNW Apartments are administered by the New York City Department of Housing Preservation and Development (HPD). They are not administered by HCR. Thus, HCR's February 22 Letter addresses North Town Roosevelt only.

conditions.[9] The conditions were designed, among other things, to provide the Commission greater assurance that our Financial Harm Test (i.e., the analysis that, after submetering is introduced, more tenants than not will benefit after the shift in responsibility for electric charges from the Landlord to tenants) would be met. We did not address the resumption of submetering at the North Town Roosevelt apartment complex in the August 2011 Reinstatement Order because the Financial Harm Test results for North Town Roosevelt were different, and less favorable to tenants, than the results for the other three apartment complexes, and because of HCR's previous request that we delay our decision while its discussions with HUD were on-going. Moreover, Petitioner failed to specify how a sufficient number of North Town Roosevelt low income tenants would benefit from submetering such that we could accept the North Town Roosevelt plan.

Since issuance of the August 2011 Reinstatement Order, HCR has informed the Commission that HUD has approved its request to establish building specific utility allowances for North Town Roosevelt and similarly situated complexes. For its part, Petitioner has also restated its initial commitment to an ongoing Home Energy Assistance Program (HEAP) enrollment effort[10] as well as an ongoing, on-site, initiative to enroll eligible low income, senior and disabled tenants at North Town Roosevelt into the HCR program that provides a $40 per month additional allowance ("electric submetering surcharge") to the rent reduction these tenants receive when submetering is introduced.

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[9] Cases 08-E-0836 (Frawley Plaza), 08-E-0837 (Metro North) and 08-E-0839 (KNW Apartments), Order Authorizing Submetering With Conditions (issued and effective August 24, 2011)(August 2011 Reinstatement Order).

[10] HEAP is a federally funded program that provides limited heating assistance to qualifying residential households.

As described below, we will apply the same conditions we applied to Petitioner's other three apartment complexes to North Town Roosevelt, and, with these conditions, we are confident that submetering will be a benefit to most North Town Roosevelt tenants and also to most low income tenants in that apartment complex. In addition, we believe Petitioner's commitment to enroll eligible tenants in HCR's utility surcharge program, and the development and implementation of revised utility allowances by HCR will allow North Town Roosevelt not only to meet, but to exceed, the minimum requirements of our Financial Harm Test. Therefore, we will reinstate authority to submeter at North Town Roosevelt upon the satisfaction of the conditions described herein.

Procedural Background

As more completely described in the August 2011 Reinstatement Order, this proceeding began when Petitioner submitted four petitions to submeter at the four apartment complexes in New York City (Frawley Plaza, Metro North, North Town Roosevelt, and KNW Apartments), which were approved for submetering in 2008.[11] Due to factual deficiencies in those original submetering petitions, the Commission re-opened its prior approvals in response to tenant rehearing petitions. On September 17, 2009, the Commission stayed submetering at all four complexes.

Our stay of submetering through the 2009 Rehearing Order was to remain in effect until Petitioner submitted submetering plans for each complex demonstrating that the Petitioner would comply with four specific conditions. In addition, we described additional notice requirements to be implemented before submetering would be introduced, required the Petitioner to provide written

[11] Case 08-E-0836, Untitled Order (issued and effective November 21, 2008) and Cases 08-E-0837, 08-E-0838, and 08-E-0839 Untitled Orders (issued and effective November 28, 2008).

notice to tenants of their rights under the Home Energy Fair Practices Act (HEFPA),[12] and discussed Petitioner's proposed practice of characterizing unpaid electric charges as rent. Finally, we directed that Petitioner develop revised submetering plans in accordance with our Order and in consultation with tenants and other interested parties.

Notice of Petitioner's October 21, 2010 submetering plans, detailing its revisions to the North Town Roosevelt and other three apartment complexes was published in the New York State Register on November 17, 2010. Comments were received from nine state and federal elected officials, including Assemblyman Micah Kellner (Assemblyman Kellner) on December 23, 2010 and from the Coalition of Urban American Tenant Associations (CUATA or Tenants) on January 3, 2011. During the initial comment period, at least 130 individual tenants filed public comments with the Secretary. By Notices issued January 13, 2011 and January 18, 2011, the Secretary ultimately extended the comment period to February 15, 2011. In all, more than 350 tenants commented on Petitioner's revised submetering plans, the vast majority of whom reside at North Town Roosevelt. CUATA also submitted a "Thermal Imaging Report" that purported to show the extent to which the buildings in all four apartment complexes are energy inefficient. On February 18, 2011, Petitioner responded to the Assemblyman Kellner and CUATA comments and, more generally, to individual tenants' complaints, as well as to the Thermal Imaging Report.[13] As relevant here and as

[12] PSL Article 2 and 16 NYCRR §§ 11.1 – 11.32.

[13] We thoroughly summarized and addressed in our August 2011 Reinstatement Order the comments we received that were applicable to all four Urban American apartment complexes, and, therefore by inclusion, applicable to North Town Roosevelt. These comments and our response, as they are relevant to North Town Roosevelt, are also set forth in Appendix A to this Order.

discussed above, comments were also received in a February 22, 2011 letter from the New York State Division of Housing and Community Renewal. HCR also provided to Department Staff a copy of the September 6, 2011 letter from HUD approving HCR's proposal which would, when implemented revise the utility allowances at North Town Roosevelt.

The August 2011 Reinstatement Order lifted the stay of submetering at Frawley Plaza, Metro North and KNW Apartments because each met, and indeed exceeded by a significant margin, that which the Commission required in the 2009 Rehearing Order. We did not lift the stay of submetering at the fourth complex, North Town Roosevelt.

In September 12 and September 14, 2011 submissions of additional comments, tenants offered a further assessment of the condition of the North Town Roosevelt complex, limited information on possible new technologies available for Roosevelt Island, and informal estimates of bill reductions which might occur if efficiency improvements were provided at the complex. While these comments are untimely, we nonetheless reviewed them.[14]

REVISED NORTH TOWN ROOSEVELT SUBMETERING PLAN

In the revised submetering plan Petitioner submitted on October 21, 2010, Petitioner made commitments to programs it would implement at all four complexes addressed by the 2009 Rehearing

[14] The tenants provided no new information in the comments we received after the August Reinstatement Order that would cause us to modify our decision here. The possibility of adding new energy technologies to supply electricity to Roosevelt Island, a possibility to which these comments refer, but for which little description is provided, could result in lower commodity costs or other benefits for customers. These benefits, however, would be expected to be as available when submetering is introduced as they would be if the existing master metering were continued.

Order. Under the submetering plans, all of Petitioner's commitments would be in place before submetering began at the properties. The commitments are that:

> (1) the rent reductions provided to tenants not assisted by Section 8 when electric charges are no longer included in rent because submetering has been introduced will be the same as the rent reductions (i.e., the utility allowances) established by HCR for the Section 8 tenants at North Town Roosevelt;
>
> (2) Petitioner will install an accessible, programmable thermostat in the major living area of each apartment with each tenant having two opportunities to provide access to his or her apartment for the installation of the thermostat before submetering is begun and after which the tenant continues to have the option to have the thermostat installed, even though such installation may occur after submetering is begun;
>
> (3) Petitioner will replace refrigerators that are more than 10 years old with Energy Star® rated refrigerators in each apartment, with each tenant having two opportunities to provide access to his or her apartment for the refrigerator replacement before submetering is begun and after which the tenant continues to have the option to have the replacement, even though such replacement may occur after submetering is begun;
>
> (4) Petitioner will register as a vendor under the HEAP to "assure that all eligible tenants may receive HEAP benefits."[15]
>
> The Petitioner also clarified the measures it would take to aggressively promote HEAP enrollment for eligible tenants at North Town Roosevelt in an August 29, 2011 e-mail to Department Staff which stated that:
>
> > North Town Roosevelt will, among other things:

[15] October 2010 Filing 7.

> (i) use its best efforts to work with the Tenants Association to develop plain-language written information regarding the availability of HEAP and deliver such information to all tenants at North Town Roosevelt;
> (ii) ensure that the energy advisor(s) that the Petitioners previously identified in the October 21, 2010 revised submetering plan distribute and discuss such information regarding the availability of HEAP at the energy education programs with tenants;
> (iii) work with the NYC Human Resources Administration on an ongoing basis to identify, provide, and advise eligible tenants of convenient opportunities to apply for and enroll in HEAP, and, where possible, to make such opportunities available onsite and at times convenient to tenants (emphasis in original).

(5) Petitioner will complete the NYSERDA Energy Reduction Plans created for the North Town Roosevelt complex; and

(6) Petitioner will provide a comprehensive energy efficiency education program for tenants in conjunction with the implementation of submetering. In its October 2010 Filing, Petitioner described the energy education program which it will provide as follows:

> As part of this energy-efficiency program, the Petitioners will ensure that the [third party expert selected to provide the energy-efficiency program for tenants] provides and distributes written materials to the tenants at [North Town Roosevelt]
> (1) identifying the costs associated with energy-consuming equipment and devices common in tenants' apartments,
> (2) describing energy-savings practices and habits that would be relevant to the tenants at the Properties, and
> (3) indicating the potential energy savings these measures could provide to individual tenants and the associated bill savings.
> Following approval of the Submetering Plan and no later than four months prior to the commencement of submetering at the Properties, such written materials shall be delivered to

> every apartment and again between October 1st and November 15th of the next heating season.
>
> The Petitioner will also be responsible for assuring that the energy-efficiency expert is available to the tenants at the Properties at least once per month for six months beginning four months prior to the commencement of submetering at the Properties. At that time, the expert shall deliver energy education programming to improve tenants' understanding of how submetering works and how tenants can utilize submetering to reduce household expenses. The expert will be made available at [North Town Roosevelt] at a time that is convenient to the majority of tenants.
>
> This energy-efficiency expert shall also be available for more personalized energy usage counseling to tenants with high electricity usage, defined generally as those using electricity valued in excess of 50% above the utility allowance set by the applicable PHA [Public Housing Authority]. This targeted educational initiative shall be conducted two months prior to the commencement of submetering at each of the Properties at a location and time convenient to high-use tenants. For all events that this energy-efficiency expert is to be available to the tenants at [North Town Roosevelt], [Petitioner] shall ensure that adequate, timely, and advance notice of such meeting(s) is provided to the tenants of [North Town Roosevelt].[16]

[16] October 2010 Filing 9-10.

The October 2010 Filing included the results of the Financial Harm Test for each of the four complexes.[17] Petitioner found that among Section 8 tenants, 77.55% (Frawley Plaza), 64.86% (Metro North), and 73.41% (KNW Apartments) will benefit financially from submetering. In contrast, for North Town Roosevelt, just under 50% of Section 8 tenants (49.57%) would benefit.[18]

Petitioner did not specify the manner in which it would ensure that a sufficient number of North Town Roosevelt low income tenants would benefit from submetering such that we could accept Petitioner's North Town Roosevelt plan. Instead, Petitioner asserted that it would enroll as many tenants as would be necessary in either the federal HEAP program or HCR's "electric submetering surcharge" program[19] so that more low income tenants than not would

[17] In the 2009 Rehearing Order, the Financial Harm Test was described as a determination that more tenants are helped than harmed by the introduction of submetering. The 2010 Riverview II Order states more specifically how the Financial Harm Test could be met in the Riverview II case. It states: "If the[Section 8] utility allowance is equal to or greater than the tenant's electric charges, then the tenant suffers no financial harm from the transition to submetering. If this is true for more than half the tenants, then tenants as a group are unharmed." 2010 Riverview II Order 19. Previously, in our 2009 Rehearing Order, we specified that this test would be applicable to tenants as a group, and to Section 8 tenants as a group.

[18] October 2010 Filing 6 and Confidential Exhibit D.

[19] HCR's program for a supplemental "electric submetering surcharge" would be available to low income North Town Roosevelt tenants who qualify because they are elderly or disabled. The benefit is provided as a supplement to the HCR approved utility allowance. It is, therefore, an additional reduction in rent which occurs for qualifying tenants when submetering is implemented. At the present time, the additional benefit from the "electric submetering surcharge" is $40.

benefit from submetering. The HEAP program or the additional "electric submetering surcharge," Petitioner explained, will provide enough tenants with further financial assistance such that more tenants than not will benefit from submetering at North Town Roosevelt.

PUBLIC COMMENTS

In our August 2011 Reinstatement Order, we addressed the many comments received from Assemblyman Kellner, individual tenants, and CUATA. Most of the individual comments, the vast majority of which had been submitted by North Town Roosevelt tenants, nonetheless apply to all of the complexes. They are summarized in an attachment to this order, Appendix A.

During this period, we also received HCR's request that we withhold submetering approval at North Town Roosevelt to allow HCR time to seek approval from HUD to establish building-specific utility allowances. As HCR explained, the utility allowances in use at the North Town Roosevelt complex are set by HCR pursuant to regulations established by HUD. Under the HUD regulations, HCR has not been authorized to set utility allowances by taking into account the energy use and consumption characteristics of an individual building or complex of buildings. Rather, HUD required that HCR base utility allowances on "typical costs of utilities and services paid by energy conservative households using normal patterns of consumption for the community as a whole."[20] HCR sought a waiver from HUD to permit HCR to develop alternative and more accurate utility allowances for North Town Roosevelt and similarly situated apartment complexes.

[20] September 6, 2011 letter from HUD to HCR.

HCR has since informed the Commission that HUD approved its request for a waiver. Specifically, in approving HCR's request for a waiver, HUD stated that the waiver, when granted, will "protect [tenants] from the heavy burden of utility costs that may be greater than typical costs in the community as a whole."[21] HCR intends to use this new authority to establish more accurate, building specific, utility allowances for the North Town Roosevelt complex, which will be used upon commencement of submetering at the North Town Roosevelt complex.[22]

On September 12, 2011, the Tenant Association of Roosevelt Landings (TARL) (the North Town Roosevelt tenant-member of the Coalition of Urban American Tenant Associations, CUATA, which filed the earlier tenant comments) submitted an additional filing advising the Commission that Amicus Energy provided TARL with an outline delineating the difficulties in submetering at the North Town Roosevelt complex. The tenants claim that Amicus Energy is a respected energy manager. According to the tenants, unlike Riverview II, to which North Town Roosevelt has been compared, North Town Roosevelt is surrounded by saltwater and winds, which creates a micro-

[21] Id.

[22] As noted above, the utility allowances at the other three apartment complexes addressed in our August 2011 Reinstatement Order were set by a different agency, HPD, and not by HCR. The utility allowances in use for those three apartment complexes were significantly higher than those which would be in use for North Town Roosevelt. Undoubtedly, this accounts, in large part, for the markedly greater proportion of tenants who are helped by the introduction of submetering at those three complexes. The experience at Petitioner's other three apartment complexes, therefore, shows that if more accurate utility allowances are provided to North Town Roosevelt, the proportion of tenants helped at North Town Roosevelt should be significantly greater.

climate, the effects of which, according to TARL, have deteriorated the facade of the buildings. TARL claims that submetering at North Town Roosevelt will perpetuate energy waste at the complex and will place an undo financial burden on the tenants to shoulder the waste resulting from repairs they have no means to correct. TARL requested that we review the outline it provided to see the pervasiveness of the building's repair and structural problems and, before removing North Town Roosevelt's stay of submetering, that we schedule a hearing with Amicus Energy. In addition, the tenants association prepared a spread sheet delineating the likely financial impact of submetering the building under the Landlord's present proposal.

Soon after, on September 14, 2011, TARL filed by e-mail a further request to postpone a decision on submetering at North Town Roosevelt based upon a Stanford University proposal that is expected to revamp the energy plan for the entirety of Roosevelt Island. The Tenants suggested that Petitioner meet with the Stanford developers to discuss alternative energy production rather than lock in tenants to a "painful" and "expensive" energy plan, such as submetering.

DISCUSSION

Conditions to Submetering

In lifting the stay of submetering at Frawley Plaza, Metro North and KNW Apartments in our August 2011 Reinstatement Order, we permitted the owners of those three apartment complexes to begin submetering upon fulfilling certain conditions. While each of these conditions is intended as a further tenant protection measure, the effect of each of these conditions will also be to increase the number of tenants who will benefit from submetering. In so doing, each measure increases the extent to which more tenants are helped than are

harmed by the introduction of submetering. Specifically, these conditions are:

1. Installation of programmable thermostats.

For the apartments in these buildings, one of the most significant electric loads for which the tenant will become responsible when submetering is introduced will be for the apartment's electric baseboard heating. To maximize the tenant's ability to control the electric heat and, therefore, to manage wisely this portion of the electric bill, we required the installation, in each apartment, of a programmable thermostat. Because the thermostats will greatly increase a tenant's ability to control electricity usage without sacrificing his or her comfort, it is expected that the thermostats will permit the tenant to reduce electric usage and, as a result, to reduce his or her electric bill. Thus, with this equipment in place, it is reasonable to expect that the number of tenants who will benefit from the introduction of submetering will increase.

2. Refrigerator replacements.

Another significant electric load in any apartment is that associated with the refrigerator. Great improvements in refrigerator efficiencies have occurred in recent years. However, if a tenant has a refrigerator older than 10 years, it is unlikely that the refrigerator includes these energy efficiency benefits. This condition, which requires the replacement of refrigerators over 10 years old with Energy Star® rated refrigerators, assures that these tenants will, when submetering is introduced, be using more efficient refrigerators. With Energy Star® refrigerators, rather than the older, less efficient models, the tenant will have lower electric bills and, therefore, will be more likely to benefit from the introduction of submetering.

3. HEAP enrollment program.

Once a tenant is responsible for the charges associated with the electric heat in his or her apartment, the tenant, if income eligible, may apply for a grant from the HEAP program to assist in paying the electric bill. These HEAP grants are, therefore, a direct benefit to the qualifying low income tenant, one which is made possible by the introduction of submetering and which moderates significantly the amount the submetered tenant will pay in electric charges. Petitioner committed for each of the three other apartment complexes to conduct an aggressive program to notify tenants of the availability of the HEAP program and to make the tenant application process as accessible to tenants as possible. When these efforts are made, it can be expected that a substantial number of low income tenants will qualify for and receive grants from the HEAP program. When this occurs, the Commission can conclude that a significant number of low income tenants not now shown to benefit from submetering will in fact do so.

4. Completion of the NYSERDA Energy Reduction Plans.

The NYSERDA ERPs are specific measures installed in Petitioner's buildings to improve the energy efficiency of those buildings. Completion of the ERP before submetering begins means that cost effective energy efficiency measures have been installed and are functioning to reduce tenant energy costs before these costs are shifted from the landlord to tenants. These measures and the impacts they will have on tenant electricity bills further increase the extent to which more tenants are helped than harmed by the introduction of submetering.

5. Energy efficiency education programs.

Tenants will benefit from submetering through individual actions they may take to control electricity usage.

Tenants, who have not been responsible for their electricity bills before submetering, must learn the techniques and practices that are available to them to control this usage. To prepare tenants to take advantage of the opportunities available, Petitioner has committed to providing, and the August 2011 Order requires the delivery of, a significant energy efficiency education program for tenants before submetering begins. The provision of this program is also expected to increase the number of tenants who are helped, rather than harmed, by the introduction of submetering.

Just as we imposed these five conditions for the resumption of submetering at the Frawley Plaza, Metro North, and KNW Apartments complexes in our August 2011 Reinstatement Order, we will impose these conditions on the resumption of submetering at North Town Roosevelt. We anticipate that these conditions will have the same effect at North Town Roosevelt as they will when applied to the Frawley Plaza, Metro North and KNW Apartments complexes (i.e., to significantly increase the proportion of tenants who are helped by the introduction of submetering). We recognize also that an additional utility allowance may be available to some or all North Town Roosevelt tenants. As noted by the Petitioner, there is currently the opportunity at North Town Roosevelt for elderly and disabled tenants to apply for a $40 per month "electric submetering surcharge". With this added allowance (in effect, an increase in the rent reduction that comes with submetering), many tenants will receive an additional significant benefit, which will greatly increase the likelihood that more tenants will benefit financially by the introduction of submetering. It is our understanding that the availability of this added allowance will end when HCR completes its process of creating more accurate, apartment complex-specific utility allowances for North Town

Roosevelt. However, the new utility allowances are expected to apply to all tenants when submetering is introduced. The new utility allowances are expected, notwithstanding the discontinuance of the "surcharge" allowance for qualifying elderly and disabled tenants, to further assist tenants by more accurately reflecting conditions at North Town Roosevelt.

As noted above, each of the above-numbered conditions was identified in the August 2011 Reinstatement Order, and the Petitioners for each of the three apartment complexes addressed in that order were required to meet these conditions before submetering could begin. On behalf of its North Town Roosevelt complex, Petitioner has made representations and commitments in support of its request to begin submetering that are described above and that are the same as the representations and commitments made in the petitions approved in the August 2011 Reinstatement Order. We require in this order, as we required in the August 2011 Reinstatement Order addressing Petitioner's other three apartment complexes, that, as a condition to the reinstatement of its authority to submeter at North Town Roosevelt, the Petitioner shall fulfill each of these commitments made through the October 2010 Filing. In this way, we will require in this case the same conditions as we imposed on Petitioner's other three apartment complexes in the August 2011 Reinstatement Order. With these conditions in place and for the reasons described above, the Financial Harm Test and the three other requirements of our 2009 Rehearing Order will be met. Indeed, as with the complexes addressed in the August 2011 Reinstatement Order, it is anticipated that, when these conditions are fulfilled and submetering is introduced, the number of tenants, and the number of low income tenants, who, in terms of the Financial Harm Test, will be helped by the

introduction of submetering will be markedly greater than the number of tenants who are harmed.

As with the apartment complexes addressed by the August Order, the stay of submetering at the North Town Roosevelt apartment complex is lifted when fulfillment of these conditions has been demonstrated to Staff in a compliance filing.[23]

Termination of Service for
Non-Payment of Electric Charges

In the 2008 petitions for rehearing which were directed at all four of the Owner's apartment complexes, tenants expressed concerns that apartment leases might be modified to include a provision that characterized electric charges as rent. Their concern was that, if electric charges could be characterized as rent, then unpaid electric charges might be used by the Landlord as a basis for eviction, even though the tenant was otherwise current on rent.

In our August 2011 Reinstatement Order, we noted that, while our 2009 Rehearing Order directed the Petitioner not to treat electric charges as rent, we revisited this issue in our 2010 Riverview II Order. As we stated in the August 2011 Reinstatement Order, the 2010 Riverview II Order

> revised our outright prohibition on the characterization of electric charges as "rent". We concluded that, given Riverview II's inability to terminate submetered service due to technical limitations, we would not prohibit the landlord from pursuing the civil remedies it may have based on the nonpayment. We explicitly provided, however, that the landlord must provide the tenant with all the procedures and protections available to the tenant under HEFPA before commencing any civil proceedings, including those for

[23] The compliance filing shall be submitted to the Director of the Office of Consumer Policy, who will determine within 30 days of receipt whether it is accurate and complete. A copy shall also be submitted to the Secretary allowing active parties to receive electronic notice of such filing.

> eviction. Thus, while we did not prohibit outright the characterization of unpaid electric charges as "rent", we required that all of the protections and procedures available through HEFPA (notably, the option to continue service through a deferred payment agreement and extensive consumer complaint review and procedures opportunities from both the landlord and DPS) be provided. In reaching this conclusion in Riverview II, we emphasized that Riverview II's submetering equipment could not be used to terminate electric service to an individual apartment and that the design and installation of this equipment preceded our determinations in these cases to limit the landlord's ability to characterize unpaid electric charges as "rent".[24]

Here, as was the case in Riverview II and in the apartment complexes addressed in the August 2011 Reinstatement Order, the Landlord's submetering equipment does not have the capability to disconnect the electric service to individual apartments. Accordingly, we address this issue for North Town Roosevelt in the same way as it was addressed in our August 2011 Reinstatement Order. Specifically, in that order we said,

> We conclude that the balance struck in the 2010 Riverview II Order should be applied here as well. Our policy, as reflected in that Order, is to encourage submetering, even in those instances where the landlord's prior investment in submetering equipment does not enable the landlord to terminate electric service to individual apartments, and to avoid the imposition of additional burdens on submetered tenants. Here, as in Riverview II, we make explicit that, in all cases, the tenant who is in arrears on his or her electric charges will receive the benefits of all of the protections and procedures available under HEFPA and that these protections and procedures will be provided before the Landlord seeks any other civil remedy based on such arrears. We will not, through this order, attempt to limit further the civil remedies available to Petitioner when these HEFPA protections and procedures have been exhausted.[25]

[24] August 2011 Reinstatement Order 30-31.

[25] August 2011 Reinstatement Order 33-34.

Based on the discussion in the August 2011 Reinstatement Order, we ordered there, and, because the same facts are presented, we are directing here, that the Landlord proceed as follows:

> in the event of non-payment of electric charges, to afford the tenant all notices and protections available to such tenant pursuant to HEFPA before any judicial action based on such non-payment is commenced. The HEFPA notices and protections that we require the submeterers to provide before any judicial proceeding commences, include, but are not limited to, deferred payment agreements as set forth in Public Service Law §37 and 16 NYCRR Part 11, budget and levelized billing plans as set forth in CASE 08-E-0439, Public Service Law §38 and 16 NYCRR Part 11, the complaint handling procedures as set forth in Public Service Law §43 and 16 NYCRR Part 11, and the special protections for medical emergencies, elderly, blind and disabled customers, and for cold weather periods as set forth in Public Service Law §32 and 16 NYCRR Part 11.[26]

We find Petitioner's revised North Town Roosevelt October 21, 2010 submetering plan to be in accordance with these requirements.

Notice to Tenants

In the 2009 Rehearing Order, the 2010 Riverview II Order and the August 2011 Reinstatement Order, we have repeatedly emphasized the need for submeterers to provide tenants not only certain statutory and Commission-ordered protections, but also the need to provide adequate prior notice to tenants of those protections. Petitioner's North Town Roosevelt submetering plan includes the necessary and statutorily required commitment to the same type of annual notice of HEFPA-protections, notice to individual tenants of the commencement of submetering, and of the availability of the Department's consumer complaint procedures as a

[26] August 2011 Reinstatement Order 35 (emphasis in original).

mandatory, initial alternative to any other conflict resolution procedure the Landlord or lease might seek.[27]

CONCLUSION

Based on the foregoing, we remove the stay of submetering at North Town Roosevelt pending a complete compliance filing, as described in the body of this order, that includes the information required in this order.

The Commission orders:

1. With respect to the submetering plan submitted by North Town Roosevelt, such plan is approved with the conditions described herein. To implement these conditions in accordance with this order, Petitioner will submit a compliance filing to the Secretary to the Commission and the Director of the Office of Consumer Policy. Once Petitioner receives confirmation from the Director of the Office of Consumer Policy that such filing is complete and in accordance with this order, the permanent stay of submetering imposed by the 2009 Rehearing Order is lifted.

2. As set forth in the commitments made in Petitioner's October 2010 Filing, summarized and further described in the body of this Order and as a condition for the lifting of the permanent stay of submetering, Petitioner shall demonstrate by affidavit in the compliance filing required in ordering clause 1, inter alia, that:

[27] Petitioner October 2010 Filing 11. Our detailed response to Assemblyman Kellner and tenant complaints that notice and their ability to be heard was truncated in any way were rejected in our August 2011 Reinstatement Order. For the same reasons, these assertions would be rejected here.

(a) Rent shall be reduced for non-Section 8 tenants by the same amount as the utility allowance which is provided to similarly situated Section 8 tenants;

(b) Petitioner has completed its program to install in each apartment one programmable, accessible, thermostat located in the primary living area. Such demonstration in the compliance filing shall document the thermostat installation program's procedures, and the effectiveness of such procedures, when access to apartments has been unavailable and Petitioner has been unable to complete the installation prior to submetering and, for apartments not equipped with a programmable thermostat before submetering begins, the procedure that will be used to ensure the prompt installation thereafter of a thermostat upon the tenant's request;

(c) Petitioner has provided to all tenants whose apartments include a refrigerator manufactured before 2001, (1) notification that they qualify for the installation of an Energy Star® rated refrigerator; (2) at least two opportunities for entry to the tenant's apartment so that the refrigerator replacement can be made prior to submetering; and (3) for apartments not provided a qualifying refrigerator before submetering begins, the procedure that will be used to ensure the prompt provision thereafter of such refrigerator upon the tenant's request.

(d) Petitioner is registered as a HEAP vendor and is prepared to conduct an aggressive program to enroll eligible tenants in the HEAP program, as described in the body of this order;

(e) Petitioner has completed its NYSERDA ERP by providing a NYSERDA certificate of completion; and,

(f) Petitioner has completed the pre-submetering energy efficiency education requirements and has submitted a

plan for the completion of the post-submetering energy efficiency education requirements on the timetables and as set forth in this order;

3. Petitioner's compliance filing shall affirm that Petitioner will provide all notices and protections available to tenants pursuant to HEFPA before any judicial action based on any non-payment of electric charges will be commenced in accordance with the body of this order.

4. Notice of when submetering will begin shall be supplied by Petitioner to tenants no less than two months prior to the commencement of submetering.

5. Petitioner shall provide annually notice of HEFPA protections available to all submetered tenants and such notice shall:

(a) include explicit reference to the complaint procedures available to tenants under the Home Energy Fair Practices Act, PSL Article 2;

(b) include notice that the tenants may, at any time, contact the Department of Public Service if they are dissatisfied with the decision of building management and/or their agents regarding an electricity complaint, which shall include actual DPS contact information; and

(c) notify tenants that the Article 2 complaint procedures are available to tenants notwithstanding the pendency of any alternative procedures offered by the Petitioner or described in the tenants' leases.

6. The Secretary may extend the deadlines set forth in this order.

7. This proceeding is continued pending the Secretary's receipt of confirmation by the Director of Consumer Policy that the conditions set forth in this order have been met, at which time this proceeding is closed.

By the Commission,

Jaclyn A. Brilling
Digitally Signed by Secretary
New York Public Service Commission

JACLYN A. BRILLING
Secretary

APPENDIX A

PUBLIC COMMENTS AND DISCUSSION[1]

In the individual comments the Commission received, most tenants expressed concern primarily about the high cost of heat in North Town Roosevelt's poorly insulated, electric heated, apartments. They noted gaps under front doors that lead to unheated hallways. Some claimed that, because of mistakes in wiring, tenants will be paying for electricity used in common areas in addition to the electricity in their own apartment. Others stated that common areas are overheated; some said they are drafty. Disabled, senior, and fixed income tenants opposed submetering for fear they will not be able to afford a separate electric bill, fear of eviction if they are not able to pay their bill, and, generally, explain that rising costs create financial problems. Finally, many tenants asked for more information on the Commission's Financial Harm Test, the results of which Petitioner shared with tenants, but the individual resident details of which, due to privacy protections, were not shared among the individual tenants. Given that Assemblyman Micah Kellner's and the Coalition of Urban American Tenants Associations'(CUATA) comments reflected most of

[1] Comments in this proceeding were addressed to the proposed submetering at all four Urban American apartment complexes at issue in our 2009 Rehearing Order. Our August 2011 Reinstatement Order addressed submetering at three of these four apartment complexes and, because the comments referred by inclusion to those three apartment complexes, the August 2011 Reinstatement Order discussed our consideration of those comments. This APPENDIX sets forth these comments again because, again by inclusion, the comments are addressed to the North Town Roosevelt apartment complex which is the subject of this Order. Except where new information has become available, this Appendix restates the discussion of the comments that was provided in the August 2011 Reinstatement Order.

the concerns raised in the individual comments, we address them below.

Consultation With Tenants

Regarding the Commission's requirement that Urban American work cooperatively with tenants in developing their revised submetering plans, Assemblyman Kellner's December 23, 2010 and CUATA's January 3, 2011 comments claim that only two meetings with elected officials took place and the meetings were "one-sided."[2] Tenants complained that the meetings created expectations which could not be met. Specifically, the tenants said their questions were not answered at meetings and the detailed plan tenants and Assemblyman Kellner offered for how Petitioner should address the special electric heating costs of seniors and tenants with disabilities was ignored. Instead, it is asserted that Petitioner pressed forward without including "any suggestions at all" from tenants.[3] Assemblyman Kellner expressed his belief, therefore, that the meetings with elected officials and tenants "failed substantively to comply"[4] with the 2009 Rehearing Order, because Petitioner did not incorporate "numerous important suggestions" from tenants and elected officials into their submetering plans.[5] Assemblyman Kellner also claimed Petitioners should have disclosed the "data purporting to minimize the financial impact" of submetering even though it was a confidential exhibit to the October 2010 Filing.

We find that Petitioner complied with our directive that it engage tenants and their representatives in the process

[2] Assemblyman Kellner 3; CUATA 4.

[3] Assemblyman Kellner 5.

[4] Assemblyman Kellner 2.

[5] Assemblyman Kellner 5.

of developing the new submetering plans. The Landlord met with tenants and elected officials on six occasions and communicated with them in writing on five more occasions. Exhibit A to the October 2010 Filing includes e-mail correspondence, written answers to two sets of extensive tenant questions, and Landlord newsletters summarizing planned energy efficiency, thermostat installations, and the petition process.

It may be that specific questions and answers were not exchanged at these meetings, but many sets of IRs and questions from Assemblyman Kellner and tenants were answered in writing (on November 4, 2009, July 19, 2010, September 16, 2010, October 8, 2010, October 14, 2010, and February 22, 2011) and numerous e-mail exchanges were shared, as shown in Petitioner's Exhibit A. Moreover, Petitioner took responsive action. Most notably, in direct response to tenant requests that older, more inefficient refrigerators be replaced on an accelerated timetable, Petitioner commits to replace all refrigerators more than 10 years old with Energy Star® models.[6] Moreover, Petitioner has committed to providing monthly updates describing building and energy efficiency improvements.[7] Therefore, Assemblyman Kellner is mistaken in claiming that Petitioner "failed to incorporate suggestions from tenants and others." The lists of questions Assemblyman Kellner claims Petitioner has not answered in its petition are in fact answered in the October 2010 Filing, were never required in our 2009 Rehearing or Riverview II Orders, or were, in verifying tenant usage data, independently confirmed through DPS Staff analysis as part of our deliberative process.

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[6] October 2010 Filing 2.

[7] Petition Exhibit A, January 15, 2010 letter to Manhattan Borough President Stringer.

Public Availability of Data

Assemblyman Kellner's complaint that apartment-level usage data was difficult to obtain is belied by the Assemblyman's own e-mails. Petitioner attached to its February 18, 2011 response an e-mail correspondence from Assemblyman Kellner's office confirming his receipt of confidential, actual apartment-level usage data.[8] Moreover, it is paramount that the Commission protect the privacy of individual end-users even if doing so creates a burden on parties to a proceeding. Usage data developed in connection with a submetering proposal that identifies a tenant should not be shared without the tenant's consent and without a commitment from the recipient of such information to protect its confidentiality. Because of this, CUATA's complaint that it was not able to see individual apartment usage data is unreasonable. Private data is made available only when a party is able to agree to abide by and remain subject to a protective order, and this practice is the norm in all Commission proceedings. Assemblyman Kellner himself signed such an order; CUATA and other elected officials did not.

Petitioner's decision not to disclose actual tenant usage, which are confidential data, was reasonable. Use of the confidential data needed to determine if our Financial Harm Test has been met required that any party seeking such information submit an interrogatory request to receive it. That data remains under protective order, as it must, to protect private, individual end-user information. Petitioner acted reasonably in restricting and protecting access to individual tenant data by keeping such information confidential and sharing it only in a manner that protects tenant privacy.

[8] February 18, 2011 UA Response, Exhibit A.

Regardless of public access to the relevant data, however, DPS Staff analyzed all of the data Petitioner submitted in this proceeding, including the confidential data. Our analysis of this data provides an accurate assessment of the expected financial impacts of submetering on residents and, therefore, of the extent to which these apartment complexes comply with our Financial Harm Test.

Financial Harm Test

Tenants and Assemblyman Kellner criticized the structure of the Commission's Financial Harm Test. Consistent with many of the individual comments, they complained that the apartment complexes at issue are poorly insulated and that, despite the average number of tenants experiencing "no harm," some tenants will still be impacted with very high electric bills.[9] Assemblyman Kellner argues that the Landlord failed to use "a full year financial harm forecast" (emphasis added), which Assemblyman Kellner states was required by the 2009 Rehearing Order. CUATA also seeks to use a future estimate of charges rather than the actual shadow bills from the last year to determine the financial impact on tenants.

In the 2009 Rehearing Order, we required a forecast of electric charges because, at the time of that order, a full year of shadow bills showing actual usage was not yet available at the Petitioner properties. In the ensuing months, however, such information became available and Petitioner used actual shadow bills to estimate the financial impact of submetering on tenants. That documentation is made part of this record. CUATA and Assemblyman Kellner nonetheless seek use of forecasted rather than this actual usage. Since 12 months of historical usage information is available for these apartment complexes,

[9] CUATA 1-2.

this historic usage data should be used because it is better data, reflecting actual, rather than estimated, usage. Assemblyman Kellner's and CUATA's request to use estimated bills, therefore, is denied.

Assemblyman Kellner criticizes the financial harm data provided by Petitioners as "flawed" in that it does not take into account the recent Con Edison rate increase, higher anticipated heating costs, and the individual impact on members of vulnerable populations. CUATA agrees with the elected officials in claiming that the new Con Edison delivery rates, effective April 2011, should be reflected in any calculation of financial harm. Once the new Con Edison rates are taken into account, Assemblyman Kellner states, only 49.05%, of tenants overall pass the Financial Harm Test. Relatedly, with the failure to reflect that 2009 and 2010 temperatures were "lower than normal," Assemblyman Kellner claims the Financial Harm Test does not reflect "known normal weather patterns."[10]

CUATA and Assemblyman Kellner also seek to require a new round of shadow billing that incorporates Con Edison's most recent rate increases, to determine again if Petitioner's buildings meet the Financial Harm Test. Having rejected such a proposal in the 2010 Riverview II Order Denying Rehearing, we do so here for the same reasons. Foremost, we adopted use of a recent historical period in the after these same rates were put into effect. Moreover, it is the practice of governmental agencies establishing those allowances to update them periodically to reflect current costs. Indeed, HCR is in the process of developing just such an update and HUD has in place regulations that allow it to further subsidize vulnerable populations, senior and disabled tenants,

[10] Assemblyman Kellner 2.

until more accurate allowances go into effect ("electric submetering surcharges").

CUATA asks that the "averages" of tenant benefits more fully be made public and that the gap between utility allowances and charges, as well as the "total dollars not covered by DHCR allowances," be specified. CUATA believes that the total financial "benefits" to tenants and a comparison of benefit to harm overall for tenants should be assessed in determining submetering's impact Assemblyman Kellner further states that Petitioner has "made no mention" of whether Petitioner will charge an administrative fee or not.

Assemblyman Kellner explains his claim that, although tenants overall and Section 8 tenants as a group, at a given apartment complex, may experience no financial harm from submetering, individual tenants will still be impacted with higher electric bills and this should be remedied. The Assemblyman also suggests that the Commission should analyze the financial impact of submetering on tenants enrolled in the "Landlord Assistance Program" (LAP).[11]

In response, Petitioner cites to the standard established in the 2009 Rehearing Order and claims that Assemblyman Kellner seeks to "alter" the Financial Harm Test. Petitioner claims it would be unfair to change the Test, as first set forth in the 2009 Rehearing Order and as further described in our 2010 Riverview II Order. Moreover, Petitioner claims that LAP tenants should not be included in the subset of low income tenants to which the Commission's Financial Harm Test methodology applies because the Commission limited that group to Section 8 Enhanced Voucher tenants. Petitioner argues this, too, would change the Financial Harm Test long after its development.

[11] Assemblyman Kellner 9-10.

In seeking to ensure that each individual tenant benefit financially from submetering before submetering can proceed, Assemblyman Kellner and tenants not only seek to modify the Financial Harm Test developed in the 2009 Rehearing Order and 2010 Riverview II Order; they would render submetering and the Financial Harm Test useless. That is, if we prohibit submetering unless every tenant will not immediately benefit from submetering, we would deny its advantages for tenants who are already conscientious in their energy use or who may undertake energy conservation measures once submetering is in place. We would also deny benefits to electric ratepayers in general from conservation savings that will flow once submetering is implemented. We established the Financial Harm Test to identify instances in which the implementation of submetering would be inconsistent with our broader policy goals and we continue to apply it here for that same purpose.

Senior and Disabled Tenant Programs

Assemblyman Kellner and CUATA's concern that Petitioners did not act on tenants' offer of assistance in developing the senior and disabled tenant programs is valid. While tenants and elected officials made suggestions we do not endorse, such as calculating separate utility allowances for tenants "who rely on medical equipment based on kilowatt hours used, rather than on flat dollar amounts," "providing an additional subsidy for residents of North Town Roosevelt so that their utility allowances match those provided to tenants at the other properties" and "only charging residents the bulk rate the Petitioners pay for electricity, rather than charging the maximum amount allowed by Commission rule,"[12] we nonetheless

[12] Assemblyman Kellner 5.

believe ongoing dialogue with tenants on this issue is warranted.

Petitioner should cooperate with tenants in identifying senior and disabled tenants for purposes of securing HCR's electric submetering surcharge for eligible tenants. Moreover, HUD rules allow any disabled Section 8 tenant to petition for a higher utility allowance if necessary in the future. Petitioner's commitment to reach out to seniors and disabled tenants and to working with these tenants on a case-by-case basis to ensure that their heating costs are not unduly burdensome would be helped with input from tenant leaders. The presence of tenants with these characteristics at North Town Roosevelt, however, is not a reason to deny submetering.

Charging the Bulk Rate to End-Users

Assemblyman Kellner suggests that Petitioner should charge the bulk Con Edison rate (the lower redistribution rate Con Edison charges for electric service to submetered properties) to tenants rather than the residential rate submeterers are authorized to charge in 16 NYCRR Part 96. Alternatively, Assemblyman Kellner and CUATA state that the Landlord should charge less to seniors and disabled tenants or provide additional subsidies.[13] Assemblyman Kellner also complains that the Landlord has not included the "method of rate calculation" nor complaint procedures in leases.[14]

Pursuant to the Commission's submetering regulations, Petitioner is entitled to charge submetered customers up to the residential direct-metered rate for electric service. While the master-metered building owner is billed at the lower residential redistribution rate, that building owner is responsible for all customer care costs, including meter reading, billing, complaint

[13] Assemblyman Kellner 5.

[14] Assemblyman Kellner 6.

handling, maintenance of the submetering system, and the costs of collections and uncollectibles. Permitting submeterers to charge up to the residential direct metered rate provides submeterers a reasonable opportunity to recover these customer care costs. Moreover, the Landlord will be installing many energy efficiency measures prior to submetering, which will lower tenant electric bills. Therefore, we deny the tenants' request to carve an exception for Urban American and require it to charge tenants the master-metered rate.

Petitioner's method of rate calculation must simply be no higher than the direct metered residential rate, which it outlined in Exhibit B to its February 18, 2011 Response. We find that with the Landlord's submission of its completed HEFPA plan and its statutorily required notice to tenants of complaint proceedings (Public Service Law §43), it is in compliance with Public Service Law §53.

NYSERDA Energy Efficient Reports (ERPs)

In regard to energy efficiency, CUATA and Assemblyman Kellner maintain that Petitioner does not appear to be "firmly committed" to implementing its ERPs and that the Commission should not remove its stay of submetering until all parts of the ERP are complete. Requiring Petitioner to return to the Commission after the ERPs are complete, Assemblyman Kellner believes, will force Petitioner to comply before submetering goes into effect.[15]

We are requiring Petitioner to submit in its compliance filing a NYSERDA completion certificate before submetering may begin.[16] As third-party confirmation that such measures have been completed, it is unnecessary for Petitioner to return to the

[15] Assemblyman Kellner 10-11.

[16] Due to budget constraints, NYSERDA reduced funding for many projects, but many effective ones remained.

Commission with a new submetering petition to show the measures have been taken.

In a separate but related issue, Assemblyman Kellner, CUATA and many individual tenants comment that wiring in individual apartments is cross-wired with the wiring in common areas. In Assemblyman Kellner's words, the wiring "does not properly distinguish between apartment and common area space."[17]

In its reply comments, Petitioner submitted an affidavit from the company that installed the submeters. That affidavit states that tests were performed to ensure that cross-wiring did not occur.[18] Moreover, Petitioner suggests that tenants have at their disposal the ability to test Petitioner's claims by turning off all electrical components temporarily to see if their submeters continue to read usage. Finally, if submeters continue to read electric usage after all electric items have been shut off, tenants may complain to the landlord pursuant to HEFPA. We find Assemblyman Kellner's cross-wiring complaint baseless.

Thermostat Installations

The tenants complained that Petitioner's thermostat installation has not been completed.[19] Assemblyman Kellner further complained that the Landlord abandoned the possible use of a new technology and thermostats that would separate charges for electricity used for heat from other electric charges for which the tenant would be responsible. He also complained that this

[17] Assemblyman Kellner 2.

[18] February 18, 2011 Petitioner Reply 14, Exhibit D.

[19] Assemblyman Kellner 11.

technology may, if implemented, be harmful to health,[20] and would allow Petitioner to "remotely control tenants' heat settings."[21] Finally, Assemblyman Kellner argued that the Commission's intent in requiring that a thermostat be installed in "the major living area or sleeping space," in fact means that thermostats should be installed in "more than a single room," and argues that this would allow tenants "greater control" over their energy usage.[22]

In actuality, in the 2009 Rehearing Order, we ordered that the Petitioner's revised submetering plans include the installation of "effective thermostats in the major living area or sleeping spaces in each dwelling unit in each building (emphasis added)."[23] Therefore, Petitioner's commitment to install a thermostat in the Living Room of each apartment fully complies with this requirement. Further, since Petitioner commits to not begin submetering until all thermostats have been installed (and to the extent tenants provide access to each apartment), the tenants' and Assemblyman Kellner's complaint that thermostats have not yet been installed is moot.

The tenants' and Assemblyman Kellner's concern about the potential use of a new technology appears to be a red herring. Petitioner is not proposing to use this technology. The technology that it is proposing, i.e., programmable thermostats in each apartment's Living Room, provides sufficient improvement in each tenant's ability to control the amount of electricity they use and

[20] CUATA 3; Assemblyman Kellner 11-12.

[21] Assemblyman Kellner 12.

[22] Id.

[23] 2009 Rehearing Order 24.

fully meets the Commission's objective as described in the 2009 Rehearing Order and the 2010 Riverview II Order.

Thermal Imaging Report

On January 3, 2011, CUATA submitted a Thermal Imaging Report admittedly made by an amateur, which purports to have "identified invisible drafts" and cold room temperatures like those about which tenants have complained.[24] Some temperatures were recorded in Celsius, some in Fahrenheit, and thermal "pictures" were taken of various walls, outlets and windows in each building.[25]

Petitioner's expert, KGS Buildings, concluded that CUATA's report could not be relied upon for the purpose for which it was offered -- to show that the insulation at the buildings is poor, allowing for excessive infiltration of outdoor air. Neither could it be used to assess each building's energy efficiency level because tenants misapplied "the physical mechanisms that govern infra-red thermography and building heat loss;" therefore, the data tenants collected did not support these conclusions.[26]

As we acknowledged in the 2009 Rehearing Order, due to the era in which these cinder-block buildings were completed, insulation is poor and can only marginally be improved because the space for wall insulation is just a few inches wide.[27] Given the technical problems Petitioner's engineers raised with CUATA's Thermal Imaging Report, it cannot be credited as evidence of the level of insulation at the Petitioner buildings. Further, we

[24] Thermal Imaging Report, submitted December 3, 2011, 3.

[25] Id.

[26] Petitioner February 18, 2011 Reply, Exhibit E at 9.

[27] 2009 Rehearing Order 19, fn. 7.

developed the Financial Harm Test to evaluate the appropriateness of submetering based on actual tenant usage. That evaluation includes the impact of building-specific attributes including insulation, thermal characteristics, and other factors cited by CUATA. Finally, HCR's waiver from HUD to set new utility allowances will allow the energy efficiency particular to North Town Roosevelt to be taken into account.

Treating Electric Charges as Rent

Relying on the 2009 Rehearing Order, which would operate as a complete prohibition on civil proceedings as a remedy for non-payment, Assemblyman Kellner claims that Petitioner's revised submetering plans are prohibited by the Public Service Law, "contradicting both the law and the express public policy of the State of New York."[28] Similarly, CUATA expresses "alarm" that Petitioner's submetering plans allow for eviction for non-payment of electric charges.[29]

Assemblyman Kellner further claims that Petitioner should not be able to justify the remedy of eviction due to its inability to terminate submetered service, stating that having chosen to install the type of submetering equipment that does not allow for service termination, Petitioner's "disadvantage is self-imposed."[30] CUATA argues that Petitioner may target "vocal" tenants and subsidized tenants for eviction if leases that allow eviction for non-payment stand.

[28] Assemblyman Kellner 14. Assemblyman Kellner fails to identify precisely which law is abridged when eviction is used as a remedy for failure to pay electric charges, other than his belief that HEFPA does.

[29] CUATA 4.

[30] Assemblyman Kellner 13.

The resolution of this issue in the Riverview II case is not inconsistent with and does not create a exception to HEFPA; it actually assures that all HEFPA protections will be provided to the tenant. Thus, the tenant who is not current on his or her electric bill will be offered the same opportunities to become current or to continue service through a deferred payment agreement as are provided to a utility direct metered customer, or to have his or her complaint heard and resolved by the Public Service Commission.

Assemblyman Kellner's and CUATA's concerns that tenants will be targeted for eviction in this case have no basis in the record. Moreover, HEFPA enunciates precise timeframes with which Petitioner, and any submeterer, must abide in the event of non-payment and during which submeterers must negotiate deferred payment plans. Tenants likely are unaware of these protections because electricity has always been included in rent; however, notice of their HEFPA rights will coincide with approval of submetering and, pursuant to Public Service Law §44(3), will be provided annually to all tenants. Any evidence that a low income or Section 8 tenant who falls behind in their electric charges is being unjustifiably or unfairly targeted, as Assemblyman Kellner and CUATA fear, would be identified during resolution of the billing disputes before our Office of Consumer Services.

We cannot agree that it is Petitioner's "self-imposed" problem that it installed submeters that cannot shut off service to individual apartments. When the equipment was installed, the importance of having the ability to terminate service to individual apartments was not apparent. If the importance of this capability had never been raised before, it cannot be argued successfully that the absence of this capability in Petitioner's equipment is "self-imposed." Of course, in future submetering petitions we will look closely at any petitioner's claim that it be permitted to proceed

with submetering even though the submetering equipment it has chosen to install cannot terminate service to individual apartments.

Notice

Assemblyman Kellner complained that Petitioner "[f]ailed to comply with the Rehearing Orders' instructions regarding notice to tenants of the 45-day comment period . . . and failed to file the required affidavit documenting compliance."[31] According to Assemblyman Kellner, tenants, as of December 23, 2010, had not been told of the 45-day comment period, citing tenants' statements that they had not received notice to question "how seriously the Petitioners have taken their obligation to fulfill the terms of the Rehearing Order."[32]

First, Assemblyman Kellner's interpretation of the 2009 Rehearing Order's notice requirements is incorrect. As we made clear in that order, in requiring such additional notice of submetering petitions, we were referring to "future" petitions, not this case, which has been pending since 2008.[33] Moreover, Petitioner's revised submetering plans could have been deemed a compliance filing, not requiring any further SAPA notice and comment process.

Assemblyman Kellner is incorrect that tenants received no notice of the revised submetering filings and lacked an opportunity to comment. Petitioner provided an October 29, 2010 notice of its filing to each tenant, which it served door-to-door on 2700 apartments. That individual notice informed tenants of their 45-day opportunity to comment pursuant to SAPA.

[31] Assemblyman Kellner 2, 15-16.

[32] Assemblyman Kellner 2, 15.

[33] 2009 Rehearing Order 27.

Nonetheless, a new SAPA notice was made seeking further comments, and the Secretary authorized two extensions of the comment period in this case as a courtesy that we believed would not prejudice either party. We received at least 130 comments even before the Secretary extended the comment period, which supports a finding that Petitioner's initial notice was adequate and Assemblyman Kellner's complaints about a lack of notice to tenants are baseless. In the end, more than 350 tenants commented on these proceedings, the vast majority of whom reside at North Town Roosevelt. Therefore, any complaint that tenants lacked sufficient notice of the revised North Town Roosevelt submetering plan has no basis in fact.

CASE 08-E-0838

Robert E. Curry, Commissioner, dissenting statement

For reasons I articulated in the transcript of the September 15, 2011 session of the Public Service Commission, I dissent.