STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

CASE 11-M-0710 – In the Matter of Reviewing and Amending the Electric Submetering Regulations, 16 NYCRR Part 96.

COMMENTS OF THE PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC. ON PROPOSED SUBMETERING REGULATIONS

The Public Utility Law Project of New York, Inc., submits the following comments on proposed amendments to the submetering regulations of the New York Public Service Commission ("PSC" or "Commission") in response to the notice inviting public comments issued August 30, 2012. PULP urges the Commission to revise the regulations. The proposed regulations

- Do not once mention *tenants*, whose leases and other property rights are directly affected by a Commission proceeding and order authorizing an owner to submeter electric service.

- Define a direct utility customer and mention a master metered utility customer but do not mention or define a *submetered customer*, whose rights as a customer under the Home Energy Fair Practics Act (HEFPA) are involved.[1]

- Define the term "resident" as "occupant" even though a resident or occupant is not necessarily a tenant whose lease is affected or the submetered customer whose rights are involved, and in the context of service termination, refers to "residents" rather than the "tenant" or submetered customer who is legally responsible for payment.

- Refer to a "unit" but do not define a "unit," and uses the term "unit" when it should refer more precisely to the tenant's "dwelling," which the New York Legislature defined as a term of art in the context of the shared meter law, PSL § 52, and which applies to submetered electric service.

[1] For example, "Any utility *customer* may file a complaint with, or ask a question of, the commission relating to his or her electric, gas, steam, telephone or water service, when the *customer* believes he or she has not obtained a satisfactory resolution of a dispute with a utility regulated by the commission. Complaints may involve bills for utility service, de-posit requests, negotiations for deferred payment agreements, service problems, and other matters relating to utility service." 12 NYCRR § 12.1(a). A submeterer is a "utility" under Article 2 of the Public Service Law. PSL § 53.

- Do not require the notice of intent to submeter to include timely and adequate notice to tenants of the commencement of a proceeding in which the Commission considers an owner's application for an order allowing submetering and the opportunity for tenants to appear, answer, and be heard as parties to the proceeding prior to a decision on owners' submetering petitions,

- Do not require timely and adequate notice to tenants of an order granting an owner permission to submeter, including the right to seek judicial review of a final order or determination of the Commission pursuant to CPLR Article 78,[2]

- Allow owners only to give notice to tenants of intent to submeter, and two months' notice of implementation of submetering, without actual notice to individual tenants of the commencement of a Commission proceeding, without notice of the opportunity to appear in that proceeding, oppose an application, and be heard as parties (as opposed to non-party public commenters), even though the Commission action affects only one master metered customer and that customer's tenants who can be notified individually by service of a copy of the application with notice of the opportunity to answer as a party, and do not require the provision of actual notice to individual tenants of the order when the case is concluded,[3]

- Allow owners to begin submetering up to five years after obtaining Commission approval of submetering in a proceeding where tenants are not individually notified of its commencement and the opportunity to appear and be heard as interested parties, and where the order purporting to affect their rights is not served individually upon tenants, even though the Commission action affects only one master metered customer and that customer's tenants who can be notified individually by service of a copy of the application commencing the proceeding and the order affecting their property rights at its conclusion.

- Eliminate the existing regulation prohibiting residential submetering, and the requirement that utilities adopt tariffs prohibiting it absent a waiver, encouraging disregard of the rules.

- Do not forbid the markup of charges paid by owners for master metered service, other than to limit the markup to the amount that would be paid by direct metered residential utility customers, even though the Department of Homes and Community Renewal bases rent

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[2] Tenants who are not notified of a submetering order in a proceeding involving their leases often do not learn of it for years, until the owner actually begins to submeter. For purposes of the statute of limitations, "a party cannot be aggrieved by an administrative determination until he receives notice thereof," *Owners Committee On Electric Rates, Inc. v PSC,* 50 A.D.2d 45, 49 (1989). Thus, tenants who are not notified of a submetering order in a proceeding involving their leases may not learn of it for years, until the owner actually begins to submeter.

[3] The Commission has not enforced the existing notice requirements. In seventeen submetering cases involving more than 12,500 tenant households, notice to tenants was either (i) not given before the Commission issued Orders approving submetering, or (ii) was given at or after the expiration of the SAPA comment period. See, e.g., Case Nos. 00-E-1918; 00-E-1269; 01-E-1335; 01-E-1289; 0l-E-1280; 01-E-1831; 0l-E-1290; 03-E-1575;03-E-1576;03-E-1577;03-E-0889;04-E-0104;04-E-0103;05-E-0251; O5-E-0252;05-E-0205;05-E- 0206.

adjustments on the assumption that submeterers charge substantially less than a utility would charge its directly metered customers.[4]

- Do not require utilities to provide an online bill calculator that would enable residential submetered customers to check whether the owner charged them more than the utility would have had they been directly metered customers.

- Would in certain circumstances authorize the Commission to require direct metered utility customers, who have statutory and common law rights to utility service,[5] and rights to choose ESCO and green power service, to cease receiving utility service and to purchase submetered service from their landlords, without knowing and willing customer consent to the change in electric service providers,[6]

- Allow submetering of electrically heated,[7] energy inefficient premises with inadequate customer safeguards, allowing owners of structurally inefficient buildings to transfer liability to customers who lack the ability to address structural inefficiencies,

- Do not provide for a shadow billing period prior to commencement of charges for submetered service, other than for tenants with electric heat, and allows owners to use data from other buildings for the shadow bills of submetered tenants with electric heat,[8]

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[4] For example, DHCR schedules for submetered tenants in two room apartments reduce monthly rents 21.7% less than those who have direct metered service, apparently on the assumption that submetered service is 21.7% less expensive than utility service. See Update Number 2 to Operational Bulletin 2003-1, Conversion from Master to Individual Metering of Electricity with Direct Payment by Tenant, NEW SCHEDULE OF RENT REVISIONS, Schedule of Rent Reductions Affecting: New York City Rent Stabilization Code (RSC), Emergency Tenant Protection Regulations (TPR), New York City Rent and Eviction Regulations (CRER), New York State Rent and Eviction Regulations (SRER), DHCR, Dec.2, 2010. *available at* http://www.nyshcr.org/Rent/OperationalBulletins/orao20031_updated120310.pdf

[5] *Tismer v. New York Edison Co.*, 228 N.Y. 156 (1920) (Cardozo, J.) ["the duty to serve would exist without the statute, for it results from the acceptance of the franchise of a public service corporation"].

[6] In other contexts involving alternative providers of utility service, such non-consensual switching of utility providers is prohibited and characterized as "slamming."

[7] In some multiple dwellings tenants must pay significant costs to run electric blowers which distribute central heat. The owner uses another fuel for the heat, and so the tenant's dwelling is not primarily heated by electricity, but electric blowers which are not portable are necessary for distribution of the heat from ventilation shafts into the apartments. Tenants thus incur significantly higher costs of electricity necessary for heat but do not receive a heater's HEAP benefit. See *Marbley v. Bane*, 57 F.3d 224 (2d Cir.1995), discussing the heating system in an Albany building where tenants make out-of-pocket payments to the electric company for "the electricity necessary to operate warm air blower fixtures that distribute heat to their apartments," and the unavailability of a HEAP heater's benefit, *available at* http://scholar.google.com/scholar_case?case=13003288283455894l7&q=citation+Marbley+v.+Bane,+57+F.3d+224+(2d+Cir.1995)&hl=en&as_sdt=2,33

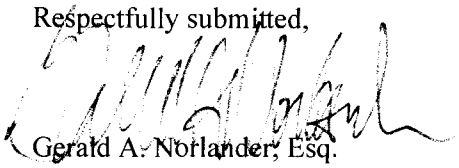
[8] DHCR rent reduction schedules are premised on the questionable assumption that once submetered, tenants will make major behavioral changes to reduce consumption in response to price signals from metered service, to avoid incurring electricity costs that are not offset by the rent reductions. Yet there is no provision for a shadow bill period for the vast majority of non-heat customers who may experience hardship as a result of unexpected

- Allows implementation of submetering and changes in rents and electric charges to sitting tenants during a lease term rather than at the time of lease renewal when a tenant would have an opportunity to renegotiate or seek other housing without penalty,[9] as is required in any building subject to HUD approval of a conversion to submetering,

- Allow submetering instead of direct metering in newly constructed buildings, thus limiting customer options in electricity service choices, such as ESCO service and green power, and requiring them to purchase electric service from their landlords.[10]

For all these reasons, it is premature to adopt amended regulations. The draft should be revised to take the above considerations into account.

Respectfully submitted,



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charges that far exceed their rent reductions based on dubious assumptions of reduced consumption and lower rates.

[9] The Ontario Electricity Board issued a Decision and Order requiring individual tenant knowing consent to submetering, and held all then existing submetering arrangements to be null and void. *In the Matter of the Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Schedule B; and *In the Matter of an order or orders authorizing certain distributors to conduct specific discretionary metering activities under section 53.18 of the Electricity Act,* 1998, S.O. 1998, c. 15, Schedule A., August 13, 2009, pp. 16-19. Although foreign decisions obviously are not binding, the reasoning of another regulator in a neighboring jurisdiction sharing a background of English common law with a reputation for fairness is persuasive.

[10] Provision for direct utility metering in newly constructed buildings has been the norm for 35 years, because rent inclusion of electricity in multi-family residential buildings where the electrical system was installed after January 1, 1977 has been generally prohibited. Case 26998, *Proceeding on Motion of the Commission as to Rent-Inclusion and Submetering of Electricity*, Opinion 76-17, (issued August 16, 1976)(Order Prohibiting Rent Inclusion of Electricity), p. 6.