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BY DMM

June 10, 2024

Honorable Michelle L. Phillips
Secretary
State of New York Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Case 24-G-0109, In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures—Appeal by WFHA 1590 Sedgwick LP of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (167958).

Dear Secretary Phillips:

Consolidated Edison Company of New York, Inc. (“Con Edison” or the “Company”) submits this response to the May 24, 2024, petition for rehearing of the Commission Determination (the “Determination”) dated May 21, 2024, filed by Utility Rate Analysis Consultants on behalf of WFHA 1590 Sedgwick LP (the “Customer”). The Determination upheld Con Edison’s billing for the Customer’s actual, metered gas usage. Because the Customer’s petition seeks a windfall of free service based on an alleged error in estimated billing—relief the Commission has uniformly rejected—the Commission should deny the request for rehearing and uphold its original determination.

I. Background

Con Edison provides gas heating service to the Customer’s building.¹ The Company issued estimated bills to the Customer for several months in 2020 and 2021, largely due to the

¹ This Customer has a second appeal pending before the Commission in Case 24-G-0170. That matter, however, relates to a separate gas service under a separate account number; it also raises different

Covid-19 pandemic and two instances in which the Company's billing system failed to issue a bill because it flagged the meter readings as potentially incorrect. The Company resolved all billing issues as of April 2021, when it began generating bills derived from actual meter readings communicated by its Advanced Metering Infrastructure equipment/

The Customer filed the present complaint in January 2023. In response to the initial determination from the Office of Consumer Services, the Company refunded the Customer an overpayment of \$299.22, plus interest. The Customer then sought an informal review, which upheld the rest of the Company's billing in full.

The Customer then appealed that decision to the Commission, arguing in part that the Company allocated the Customer's metered usage to the wrong billing periods. In response, the Company showed that the Customer's actual bills were lower than they would have been if the Company had billed the Customer based on a degree-day analysis urged by the Customer.² That is true for the entire period covered by the original complaint as well as for the more limited period from January to April 2021 at issue in the present petition.³ The Commission denied the Customer's appeal and upheld the Informal Review Decision, holding that the Company's billing was correct and timely under Commission regulations.⁴

II. Argument

Commission regulations permit a party to seek rehearing of a Commission order "only on the grounds that the Commission committed an error of law or fact, or that new

factual and legal issues and concerns different time periods than the current matter. As such, there is no connection between the two cases other than a common service address.

² Case 24-E-0109, *Appeal by WFHA 1590 Sedgwick LP of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (167958)*, Con Edison's Response to Appeal (filed Mar. 18, 2024) ("Con Edison Response"), p. 14.

³ *Id.*

⁴ Case 24-E-0109, *Appeal by WFHA 1590 Sedgwick LP of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (167958)*, Commission Determination (issued May 21, 2024) (the "Determination"), pp. 13-14.

circumstances warrant a different determination.”⁵ The regulations further require the party seeking rehearing to “specifically explain and support each alleged error or new circumstance said to warrant rehearing.”⁶

The Customer has not met its burden. In its petition, the Customer narrows its arguments to the period from January to April 2021, not the entire period cited in its original complaint. It seeks free service for the period from January 14 to February 16, 2021, because the Company allegedly allocated usage incorrectly across the three months covered by its actual meter reading in April 2021.⁷ According to the Customer, some of the usage allocated to the billing period from February 16 to April 15, 2021, should be reallocated to the period from January 14 to February 16, 2021; it then contends that any resulting bill should be extinguished as a violation of the Commission’s backbilling rules.⁸ The Customer, however, is not entitled to this novel relief because Commission precedents squarely contradict its arguments and the Commission’s backbilling regulations do not apply in these circumstances.

A. The Customer Is Not Entitled to Free Service Based on the Company’s Allocation of Usage to Different Months on the Customer’s Bills.

The Commission has clearly and consistently held that customers are not entitled to free service because of alleged violations of the estimated billing rules. Instead, the only proper remedy for alleged errors in estimated billing is corrected billing. And because customers are obligated to pay for their actual energy usage, they are not entitled to the windfall of free service where—as here—their utility has timely billed them for their actual metered usage.

⁵ 16 NYCRR § 3.7(b).

⁶ *Id.*

⁷ Case 24-E-0109, *Appeal by WFHA 1590 Sedgwick LP of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (167958)*, Petition for Rehearing (filed May 24, 2024) (“Petition for Rehearing”), pp. 2-5.

⁸ *Id.*

In its petition, the Customer argues that Con Edison’s allocation of the Customer’s actual metered usage among the three months from January 14 to April 15, 2021, violated the Commission’s estimated billing regulations at 16 NYCRR § 13.8(b)(2).⁹ But in the seminal *Green Park Sussex* case, the Commission determined that a customer’s obligation to pay its utility bills was not contingent on the utility’s compliance with estimated billing regulations:

A utility’s rates remain applicable to its customers independent of the utility’s metering and billing practices. Also, a utility’s failure to abide by its metering and billing regulations does not mean that a customer is entitled to any free service when the amount of gas the customer used can be determined with some degree of accuracy.¹⁰

The Commission has reaffirmed that core holding many times.¹¹ It has further explained that “[n]either the utility tariff, regulations, or statute provides the remedy... [of] free service for the disputed period of time.”¹² Instead, because “customers have the general obligation to pay reasonable rates for utility services,” the Commission “very rarely allows utility customers

⁹ *Id.*, pp. 2-3.

¹⁰ Case 17-G-0005, *Appeal by Green Park Sussex, Inc. of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (511799)*, Commission Determination (issued Nov. 21, 2017), pp. 8-9.

¹¹ *See, e.g.*, Case 21-E-0432 et al., *Appeal by Miguel Sosa Estates, L.P./GRC Management of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (020242)*, Commission Determination (issued Aug. 22, 2023), p. 28; Case 21-E-0188, *Appeal by Morty Sohn/Orin Management of the Informal Decision Rendered in Favor of Consolidated Edison of New York, Inc. (010940)*, Commission Determination (issued Oct. 18, 2022), pp. 6-7; Case 21-G-0156, *Appeal by Boricua Village B LLC/Wavecrest Management #116 of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (018994)*, Commission Determination (issued July 19, 2022), p. 9; Case 21-E-0141, *Appeal by Bay Park Two/Grenadier Realty Corp. of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (720076)*, Commission Determination (issued Apr. 19, 2022), pp. 10-11; Case 20-E-0616, *Appeal by Charlotte Realty Co./Katz Realty of the Informal Decision Rendered in Favor of the Consolidated Edison Company of New York, Inc. (964056)*, Commission Determination (issued May 18, 2022), pp. 7-8; Case 20-E-0229, *Appeal by 114 East 66 Street Inc. of the Informal Decision Rendered in Favor of the Consolidated Edison Company of New York, Inc. (739047)*, Commission Determination (issued Feb. 23, 2022), p. 6.

¹² Case 19-E-0129, *Appeal by Sutter Gardens Associates of the Informal Decision Rendered in Favor of the Consolidated Edison Company of New York, Inc. (712984)*, Letter Regarding Petition for Rehearing (Jan. 27, 2021), p. 2.

anything resembling a windfall of free service.”¹³ The Commission added that it “considers actual readings of an accurate meter to be conclusive evidence of use, making actual readings the most significant factor in determining what a customer is obligated to pay” and that “a record of cumulative use over multiple billing periods [is] conclusive proof of actual consumption.”¹⁴ And “[w]hen a utility estimates bills... contrary to the Commission’s regulations and a utility’s tariff, an individual customer’s remedy is limited to being made whole.... Customers cannot seek a remedy for bill estimation in and of itself.”¹⁵

Here, the Customer has not disputed the accuracy of its meter or the total consumption for which the Company billed it over the three-month period at issue. Instead, it contests only how the Company allocated that actual usage across the three months. Because those allocations are estimates, the Customer invoked the Commission’s estimated billing rules. But as the Commission has explained, “[t]he appropriate remedy is to adjust the customer’s bills to reflect the difference between estimated and actual usage.”¹⁶ Here, Con Edison has shown—and the Customer does not dispute—that allocating usage how the Customer wants would have resulted in higher bills, not lower bills.¹⁷ And so, because the Customer benefited from the alleged error, there is no basis for any further remedy.

¹³ Case 20-G-0244, *Appeal by Jewel Associates LLC of the Informal Decision Rendered in Favor of the Consolidated Edison Company of New York, Inc. (946669)*, Commission Determination (issued Mar. 18, 2022), p. 10.

¹⁴ *Id.*, pp. 10-11.

¹⁵ Case 21-E-0527, *Appeal by Mordy Sohn of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (101044)*, Commission Determination (issued Jan. 3, 2024), p. 3.

¹⁶ Case 21-G-0309, *Appeal by Maria and Bernardo Houses/Wavecrest Management of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (019006)*, Commission Determination (issued Aug. 22, 2023), p. 12.

¹⁷ Con Edison Response, p. 14.

B. The Commission’s Time Limits on Utility Backbills Do Not Entitle the Customer to Free Service.

The Customer attempts to resuscitate its claim by arguing that it should get free service because, if the Commission required the Company to revise its bills to move usage into the billing period from January 14 to February 16, 2021, then the revised bill would be an untimely backbill in violation of 16 NYCRR § 13.9(b)(2).¹⁸ The Customer is mistaken.

First, this hypothetical re-bill would not constitute a backbill under Commission regulations. A “backbill” is “that portion of any bill, other than a levelized bill, which represents charges not previously billed for service that was actually delivered to the customer during a period before the current billing cycle.”¹⁹ Here, however, the customer has already been billed for that usage. The Company would not be billing the Customer for any additional usage—and it would be increasing the Customer’s charges for that month (and overall) not of its own accord, but only because the Customer had demanded it.

Second, the Commission’s backbilling regulations do not apply to Commission determinations in customer complaint cases. The Customer relies on 16 NYCRR § 13.9(b)(2), which allows utilities to upwardly revise backbills only under particular circumstances, and even then only “within 12 months after the utility actually became aware of the circumstance, error or condition that caused the underbilling.”²⁰ The Customer interprets this to mean that the Company could not now issue a revised bill if the Commission here ordered it to adjust the Customer’s previous bills. But the purpose of that regulation is to require *utilities* seeking

¹⁸ Petition for Rehearing, pp. 3-4.

¹⁹ 16 NYCRR § 13.1(b)(17).

²⁰ *Id.* § 13.9(b)(2).

to upwardly revised customer bills to do so in a timely manner.²¹ Con Edison is not aware of any case in which *the Commission* has ordered the Company to revise its billing in a customer complaint case, only to then bar such re-billing as untimely under its backbilling regulations; nor does the Customer cite any such precedent. And so, because Con Edison is not trying to upwardly revise a backbill in this proceeding, this regulation does not apply.

As the Commission has already held, the Company's billing in April 2021 was timely under the Commission's backbilling regulations.²² The Customer's new petition does not dispute that holding or offer any basis for upsetting the Commission's determination.

C. Con Edison's Billing Did Not Violate the Public Service Law.

As a last-ditch effort to obtain free service, the Customer alleges that Con Edison's billing in this case violated Section 65(2) of the Public Service Law, which bars utilities from charging, demanding, collecting, or receiving "greater or less compensation" than it seeks from other customers using like service.²³ The Customer's argument, however, incorrectly assumes that Con Edison may only bill customers based on a regular monthly billing cycle.²⁴ Further, it ignores that the Company billed the Customer only for its actual gas consumption.

²¹ Case 28713, *Proceedings on Motion of the Commission to Adopt Rules and Regulations Extending Protections for Non-Residential Applicants and Customers of Gas, Electric and Steam Utilities, 16 NYCRR, Part 13*, Memorandum, Order and Resolution (issued Sept. 22, 1987).

²² Determination, pp. 13-14.

²³ Case 22-G-0604, *Appeal by CCBA Westchester HDFC of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (156953)*, Commission Determination (issued Jan. 22, 2024), p. 6.

²⁴ Con Edison's gas tariff states that the Company will seek to render bills either monthly or bi-monthly "[i]n the ordinary course of business." PSC No: 9—Gas, General Rule 8(D), Leaf 49 (eff. Mar. 1, 1999). It further provides, however, that "[t]he Company reserves the right to read meters and render bills at any other interval of time." *Id.* The Commission has held that this language means the Company's tariff does not require it to read meters or issue bills each month. Case 21-E-0297, *Appeal by 125 Metropolitan Owner LLC of the Informal Decision Rendered in Favor of the Consolidated Edison Company of New York, Inc. (020640)*, Commission Determination (issued June 28, 2023), pp. 10-11 & n.21 ("While the Company's tariff provides that it will schedule monthly meter readings..., the tariff also provides that the Company reserves the right to schedule meter readings and render bills at any other interval of time.").

In addition, the Commission has consistently read this statute to reach the opposite conclusion from that urged by the Customer. According to the Commission, this section of the Public Service Law means that “customers are to be charged and pay for actual service used.”²⁵ Citing the same section, it has concluded that “granting the Complainant’s requested remedy of free service would entail Con Edison seeking less compensation—no compensation, in fact—for utility service than it seeks from all of its other customers. This facially contradicts the Public Service Law.”²⁶ Thus, rather than support the Customer’s bid for free service, this section of the Public Service Law fatally undermines it.

III. Conclusion

When a utility allocates metered usage across multiple months after a period of estimated billing, the results will be different than if the utility had obtained actual readings each month. Here, it is undisputed that Con Edison’s allocation of the Customer’s metered usage from April 2021 actually reduced the Customer’s total billed charges. The Customer, however, argues it is entitled to free usage for one of the three months at issue because Con Edison allegedly allocated the Customer’s usage improperly. Commission precedent, however, precludes the remedy of free service for an alleged error in estimated billing. And so, because the Customer has paid only for the amounts it used, the Commission should deny the Customer’s petition for rehearing and uphold its original determination.

Respectfully submitted,



Edward Sherwin

CC: Douglas DiCeglio

²⁵ Petition for Rehearing, pp. 4-5.

²⁶ Case 21-E-0527, *Appeal by Mordy Sohn of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc. (101044)*, Commission Determination (issued Jan. 3, 2024), p. 12.