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March 7, 2016

Ellen H. Bindler
Utility Check Ltd.
200 Bermuda Street
Atlantic Beach, NY 11509

Mr. Jeremy Feliciano
Consolidated Edison Company of New York
4 Irving Place
New York, NY 10003

**Subject: Informal Review Decision**

**Case # 437939**
Down Under Pubs LLC.
318 Van Brunt Street, Sto.
Brooklyn, NY 11231

Dear Ms. Bindler and Mr. Feliciano:

An informal review concerning the above complaint, Down Under Pubs LLC. versus Consolidated Edison Company of New York, Inc., (Con Edison or the utility) was requested by the Utility Check Ltd. which represents the complainant. The review was performed in accordance with the Consumer Complaint Procedures of the Public Service Commission (16 NYCRR, Section 12.10). Based on all information presented I find that the utility billed the complainant correctly.

## Background

The utility's records show that the complainant maintained electric the account since April 24, 2008. The meter number 6912490 associated with the account was set up

on July 29, 2002. From the account inception the utility's billing was based on the meter's constant or multiplier 1[1]. On November 7, 2009, the utility assigned the multiplier a new value of 12. The utility upwardly adjusted billing using multiplier 12 and on February 1, 2010, issued a backbill for $21,571.95 for a period of April 24, 2008 to January 11, 2010.

On March 17, 2010, the complainant wrote to the utility arguing multiple issues and stated that the backbill was in violation of 16 NYCRR §13.9 (b) (1).[2] The utility replied by letter dated April 27, 2010 that the bill in question was issued in compliance with regulations and two months after the utility became aware of the meter multiplier error. The utility decreased the back billing period to 12 months from January 9, 2009 to January 11, 2010 and advised the complainant of a new balance of $11,834.44.

On August 3, 2011, the complainant contacted the Office of Consumer Services (OCS) requesting assistance with a backbilling dispute. Staff replied by letter dated June 4, 2012 that the use subsequent to the backbilling was historically consistent with use prior to the discovery of incorrect meter multiplier. The letter informed that the utility removed $8,140.90 and no further adjustment was necessary. The complainant disagreed and the case was referred to an informal review.

**Complainant's Position**

The complainant contended that:

[1] The meter constant/multiplier usually displayed on a front plane of the meter. It is similar to a map scale in that it relates to the meter's scaled down reading of the actual consumption.

[2] 16NYCRR §13.9 (b) (1) states:
A utility shall not render a backbill more than six months after the utility actually became aware of the circumstance, error or condition that caused the under billing , unless a court extends the time to render a backbill.

-The utility violated PSL § 67- a[3], 16 NYCRR §13.2 (b) (6)[4] and 16 NYCRR §13.9 (b) (1) [5] when it billed the customer $21,571.95 for unmetered service during the period of April 24, 2008 to January 11, 2010.

-Title 16 NYCRR §13.2 (b) requires utilities to inspect and assess the accuracy of a metering device upon the request of new commercial customers. In order to comply, the utility must advise applicants of their rights to request a meter inspection and test during the application process.

-Title 16 NYCRR §13.2 (b) (6) requires utilities to include a notice and a check off box on the service application. In Commission Case 28713[6], several utilities, including Consolidated Edison, objected to this requirement. The Commission, therefore, established the policy that allowed utilities to either provide their new customers with a service application that includes a check-off box concerning the request for a meter test and inspection, or opt to never backbill for past services when the cause was an inaccurate metering device. The Commission stated "We have thus modified this requirement to make this check-off box option a mandatory one only for those utilities that have not adopted such a backbill limitation."

-The customer's right to an inspection was not made available at the time of application. Inspection of the meter would have revealed the wrong constant. Therefore, the utility is prohibited from backbilling.

-Con Edison was alerted to a problem as early as May 2003, March and April 2008 at which time it should have inspected the meter. The history of rejected readings

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[3] PSL § 67-a states:
(1) A gas or electric corporation shall inspect and assure the accuracy of a metering device upon the request of any new commercial customer.
(2) No gas corporation or electric corporation shall charge its new commercial customer for past services received if the failure to charge for such services resulted from the faulty operation or in operation of a metering device which the gas or electric corporation failed to inspect as provided in subdivision one of this section.

[4] 16 NYCRR §13.2 (b) (6) states:
A service application shall contain, close to the place where the applicant signs, a notice that the applicant has the right to request that the utility inspect the metering device in order to assure its accuracy, along with a place for the applicant to indicate whether such inspection is requested; provided, however, that if a utility has a written policy of not backbilling previously unbilled service when the failure to charge for such service resulted from the faulty operation or inoperation of a metering device, which faulty operation or inoperation was not due to the culpable conduct of the customer or his agent, the above notice is not required.
[5] See note 2 supra.
[6] 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.

(readings coded EXLI) means that the usage exceeded 89% of the rated meter capacity. Additionally, an incorrect meter constant was reported on September 9, 2008[7], five months after the customer initiated service. The utility took no action until January 11, 2010 and violated 16 NYCRR §13.9 (b) (1).The utility failed to comply with 16NYCRR §13.2 (b) (6) by failing to advise the applicant of its right to request an inspection of the meter.

- Staff's June 4, 2012 decision was based on erroneous assumption that the customer's right to request a meter inspection was communicated through the annual rights brochure. A review of file revealed that this information had not been available to the customer. Thus, Staff's decision should be overturned.

**Utility's Position**

The utility maintained its initial position that the back bill was caused by an incorrect meter multiplier. Due to the current regulations the company could not recover the entire back bill. The back billing period was decreased to twelve months. The consultant cited PSL § 67-a as a prevailing regulation. This law pertains to the meters that are either faulty or inoperable. The meter here was neither of the two conditions; therefore, the consultant's position should be dismissed.

**Analysis**

The primary issue in this case is whether the utility properly back billed the complainant. For the reasons explained below I conclude that the billing was proper.

Absence of a written service application did not cause the utility's deficiency.

Con Edison has a computer system which tracks and details all accounts. One of its records indicates that prior to April 24, 2008, the meter number 6912490 with a multiplier 1 serviced a different customer. It appears that when the complainant requested a new service information pertaining to the premises such as address, electric service and the meter was simply transferred within the computer system from one account to another. Even if the utility required the complainant to fill out a service application, it is not clear how it would correct the error embedded into the system.

The complainant's argument that the utility failed to comply with 16NYCRR §13.2 (b) (6) and PSL § 67-a has no merit.

16 NYCRR §13.2 (3) (i) states: As a prerequisite to accepting an applicant as a customer, and providing service, a utility may require the applicant to:

[7] This note contains a code K-DIF which means that the electric meter constant reported by the meter reader differs from the constant record on the customer master record.

(i) file a written service application containing information sufficient to establish the applicant's identity and responsibility for the premises as either the owner or occupant, the correct service classification, and who controls access to the meter(s) if not the customer;

The regulations do not require the utility to obtain a written service application as a prerequisite to accepting the customer. In this case a request for the service was processed over the phone. Therefore, the article 16 NYCRR §13.2 (3) (i) here supersedes and voids any stipulations of 16NYCRR §13.2 (b) (6).

Although 16 NYCRR §13.2 (b) (6)[8] and PSL § 67-a provision for the customer's right to inspect the meter this right comes with the customer's responsibility to request an inspection. PSL §67-a (1) states:

A gas or electric corporation shall inspect and assure the accuracy of a metering device upon the request of any new commercial customer.

This article of the law clearly states that a new commercial customer may request an inspection of metering devise at inception. After such request the utility shall inspect and assure the accuracy of the meter. Complainant submits no evidence of such request. Therefore, the complainant's statement that "the utility must advise applicants of their rights to request a meter inspection and test during the application process" is not supported either by regulations or by the law.

Numerous account notes left by the Meter Operations staff do not constitute the date of "awareness" of the incorrect billing.

The complainant stated that the utility became aware of the billing issue as early as May 2003, March and April 2008. This statement raises the question which one of these events should be considered as the actual date of "awareness".

The utility provided its internal document which contains a description of the Meter Operations duties. It states:

"Meter Operations responsibility is to read meters, turn on/ turn off service, and collect monies from delinquent accounts". The complainant referred to a few readings which exceeded the historic value as an indication of the utility awareness of an incorrect billing. Those readings are the common feature for any accounts regardless whether the account was the subject to the back billing or not. The note dated September 9, 2008 is different. It clearly indicates that a meter reader noticed a discrepancy between the meter's multiplier (displayed on the meter's front plane) and the multiplier assigned to the account within the utility's computer system. However, Meter Operations staff is not responsible for the customer's billing and/or an account overview. This account note served as an

[8] 16NYCRR §13.2 (b) (6) states that the service application shall contain a notice that the applicant has the right to request an inspection of the metering device.

alert for someone else to review and make a decision whether the account was billed correctly.

Additionally, the Commission in its previous decision of Case 95-E-05841 (Whale Machinery Ltd. Vs Con Edison) stated:

"General Suspicions or even knowledge of other conditions on the part of the utility, do not constitute actual awareness of the circumstances, error or condition under 16 NYCRR Part 13.9 (b)(1) of the applicable rules. The knowledge referred to in the regulations means actual knowledge of the particular condition sufficient to justify the billing of unmetered service and to permit the upholding of that billing."

Account customer service representative (CSR) information record shows that on November 07, 2009, employee number 67629 reported "Meter loc [location] bsmt [basement] meter K 00012 dial cde [code] 5 type 3 rdg [reading] 021107..." This note reported a new meter multiplier 12. The billing record indicates that on November 07, 2009 the meter 6912490 was exchanged. Although, no actual meter replacement took place the record coded EX provided a proof of the date when the utility became aware that the prior billing was wrong and that the multiplier was corrected. Three months later, in February 2010, the utility back billed the customer in compliance with 16 NYCRR §13.9 (b) (1). Since the majority of the meter readings preceding the adjustment were actual the billing was proper and accurate.

On March 4, 2016, the utility stated that a special appointment was made to read the meter on January 29, 2010 which allowed it to verify the condition. The utility contended that after this special appointment the account was adjusted to reflect the correct meter multiplier.

**Determination**

The evidence here supports the conclusion that the billing was proper. The billing is sustained as rendered.

If either party disagrees with this decision, an appeal may be filed with the Commission. The appeal procedures are set forth below.

**APPEAL PROCEDURE**

If you believe that this decision is incorrect, you may appeal to the Commission. The basis for an appeal to the Commission is limited to one or more of the following grounds:

(1) The hearing officer made a mistake in the facts in the case or in the laws or regulations which affected his or her decision; or

(2) The hearing officer did not consider evidence presented at the hearing or review, which resulted in an unfavorable decision; or

(3) New facts or evidence, not available at the time of the hearing, have become available, and could affect the decision on the complaint.

If you choose to appeal, your appeal must be in writing and must contain an explanation of the facts or conclusions in the decision with which you disagree, the reasons for your disagreement, the relief or remedy sought from the Commission, and documentation of your position or legal arguments supporting your position.

The appeal should be filed within fifteen (15) days after the informal hearing or review decision is mailed, and may be filed electronically or by regular mail. To file electronically, e-mail your appeal to the Secretary of the Public Service Commission, Kathleen H. Burgess, at: Secretary@dps.ny.gov

If you are using regular mail, your appeal letter should be addressed to:

Kathleen H. Burgess, Secretary
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

A copy of the appeal letter should also be sent to the opposing party. Appeals of Informal Hearing Decisions become a matter of public record and are listed on the Commission's website. Both your appeal letter and the informal hearing decision will be available to members of the general public (subject to limited redaction in the case of residential customers).

The Commission may make a determination on your appeal, reject it, return the case to the informal hearing officer for additional consideration, order a formal evidentiary hearing on the complaint or take such other action as it deems appropriate.

Sincerely,

Tatyana Benyaguyeva
Informal Hearing Officer
Office of Consumer Services