STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 21-E-0141 – In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR in Relation to Complaint Procedures - 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 and Effective April 19, 2022)

The Commission received an appeal by Bay Park Two/ Grenadier Realty Corp (Complainant) from an informal review decision dated March 5, 2021, in favor of Consolidated Edison Company of New York, Inc. (Con Edison or the company). The informal hearing officer (IHO) found that, although Con Edison had improperly estimated Complainant's monthly bills for a period of 62 months, it had properly backbilled Complainant the difference between the actual and estimated bills. The IHO also found that Complainant's request for a refund of all estimated billing is improper under both the company's tariff and Commission regulations. For the reasons discussed below, the Commission affirms the IHO's decision in part and modifies the decision in part.

BACKGROUND

Complainant is a non-residential electric customer that has maintained an account with Con Edison since February 2, 2014. On May 3, 2017, Complainant filed a complaint with the Office of Consumer Services (OCS) about repeated estimated billing on its electric account. The company responded to OCS on May 24, 2017, and confirmed that the Complainant's account

was being investigated. The company then located the meter, obtained an actual reading, determined that the previous estimated bills had underestimated electricity usage, and opted to allow the previous underbilling to remain unchanged. On December 22, 2017, OCS contacted the company again, notifying it about the company's continued use of estimated bills. On January 19, 2018, Con Edison acknowledged its continued use of estimated readings and responded that it would update meter location instructions to its personnel. On February 2, 2018, OCS directed the company to immediately obtain an actual reading of the customer electric meter. Con Edison responded, on March 5, 2018, that it could not comply immediately due to emergency storm duties. OCS revisited the case on August 1, 2018, and again determined that Con Edison still continued to estimate Complainant's electric usage, and again directed the company to obtain an actual reading.

On December 4, 2018, Con Edison notified OCS that it had scheduled an actual reading. On December 28, 2018, Con Edison staff inspected Complainant's meter, confirming that it was recording and operating properly. After additional intervening communications between Con Edison and OCS, on July 5, 2019, Con Edison notified OCS that it had billed Complainant's account based on estimated usage due to rejected readings stemming from the correction based on actual readings and acknowledged that the company had forfeited the right to

backbill Complainant for periods before May 1, 2019.[1] The company then issued two backbills in the amount of $1,381.82 for May 1, 2019, to May 31, 2019, and $1,700.37 for May 31, 2019, through July 1, 2019, for a total backbill of $3,082.29 for the two-month period.[2] On July 8, 2019, Complainant notified OCS that the two backbills were improper, and requested that OCS review them. OCS sent a directive on July 10, 2019, stating that the backbills were improper due to the length of time the company had taken to address the repeated instances of bill estimates. In response to OCS's directive, the company cancelled the first of the two backbills, leaving in place the backbill in the amount of $1,700.37 for the period from May 31, 2019, to July 1, 2019. On August 7, 2019, Complainant requested an informal review of the case.

On August 21, 2019, OCS began its informal review process.[3] Complainant submitted its position statement on August 27, 2019, arguing that the company's estimated billing was improper because the company had failed to attempt an actual meter reading for a period of time far beyond what is authorized pursuant to Commission regulations, and failed to follow proper no-access procedures.[4] Complainant also reiterated its argument that the estimated bills should be cancelled and refunded in

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[1] Case 21-E-0141, Con Edison Letter to OCS and Complainant (July 5, 2019). The term "rejected readings" is defined as the influx of the corrections of all the consecutive estimates. The company's automated system is not able to handle these types of corrections, thereby requiring the manual entry of the information.

[2] Id.

[3] Case 21-E-0141, Notice of Informal Review (August 21, 2019).

[4] Case 21-E-0141, Complainant's Informal Review Initial Position (August 27, 2019), pp. 4-6.

full because they were improperly rendered for a period of 62 months.

In its position statement submitted on September 16, 2019, the company admitted that, while its prolonged use of estimated billing was excessive, it had properly addressed the issue by forfeiting its right to backbill for periods prior to May 31, 2019.[5] The company contended that the extended estimation does not entitle Complainant to free service for the entire 62-month period, and noted that relinquishing the ability to backbill for periods prior to May 31, 2019, already gave Complainant significant savings.[6]

In the Informal Review Decision, the IHO found in favor of the company, reasoning that, while Con Edison's prolonged and continuous estimated billing constituted a violation of the Commission's regulations and the company's tariff, it would nevertheless be improper to cancel the estimated bills and allow free service to Complainant as a remedy.[7]

POINTS ON APPEAL

By letter dated March 3, 2021, Complainant appeals from the IHO's determination.[8] Complainant argues that the decision included two errors of law as follows: (1) in accordance with Public Service Law (PSL) §65, the IHO should have expunged Complainant's bills for the period from June 24, 2014, to May 31, 2019, based on his/her finding that the company

[5] Case 21-E-0141, Company's Informal Review Initial Position (September 16, 2019).

[6] Id.

[7] Case 21-E-0141, Informal Review Decision (issued March 3, 2021), pp. 7-8.

[8] Case 21-E-0141, Appeal of Informal Review Decision (March 3, 2021).

improperly relied on estimated usage for that time period; and (2) the IHO misinterpreted Complainant's argument that PSL §67-a(2) allows for "free" service under certain conditions.

By letter dated April 5, 2021, the company responded to the appeal by arguing that the IHO's decision should be affirmed on the following grounds: (1) despite the duration of the estimated bills for a 62-month period, the company calculated the bills for that period in a manner that is consistent with applicable Commission regulations; and (2) applicable regulation does not allow for the cancellation of estimated bills in favor of free service.

DETERMINATION

The primary issues in this case are: (1) whether the company's estimation of Complainant's bills for the 62-month period was proper; (2) whether the company's backbill for May 31, 2019, to July 1, 2019, was proper; and (3) whether Complainant is entitled to a full refund of all charges for electric service during the 62-month period if the company's estimated billing was improper. The Commission finds that, consistent with the specific facts presented in this case, the company was deficient in rendering estimated bills despite multiple OCS and customer inquiries for the entire length of the 62-month period. The Commission also finds the company deficient by backbilling outside of the time limits allotted by the applicable regulation. Nevertheless, the Commission also finds that free service for this entire period is not an available remedy in this case. Therefore, for the reasons discussed below, the appeal is denied, in part, and affirmed, in part.

1. The Company's Estimated Bills

The Commission's regulations and Con Edison's tariff provide that the company may render estimated bills under certain circumstances and with certain conditions. The company shall attempt to obtain actual meter readings for billing based on actual usage, and may issue an estimated bill when "the utility has failed to obtain access to the meter."[9] The tariff provides procedures regarding how to notify customers in a no-access situation: "[t]he Company shall provide no access notices for non-residential accounts when the bill has been estimated pursuant to 'a' or 'b' of General Rule 10.7 commencing with: the second consecutive estimated bill to an account billed for demand."[10] Commission regulations also provide that "[a] utility shall begin providing no-access notices as described in this subdivision, commencing with: (i) the second consecutive bill estimated pursuant to either subparagraph (b)(1)(i) or (ii) of this section in the case of accounts billed for demand."[11]

Here, Con Edison's conduct violated these regulations. Con Edison obtained actual meter readings on May 31, 2019, and July 1, 2019.[12] Prior to that, Con Edison last obtained an actual reading as a basis for billing Complainant on January 25,

[9] 16 NYCRR §13.8(a)(1) and §13.8(b)(1)(i); Consolidated Edison Company of New York, Inc. Tariff, PSC No. 10 – Electric General Rules, Regulations, Terms and Conditions 10.3(a) and 10.7(a), Leaf 83 and 87.

[10] Consolidated Edison Company of New York, Inc. Tariff, PSC No. 10 – Electric General Rules, Regulations, Terms and Conditions 13.2.1, Leaf 108.

[11] 16 NYCRR §13.8(c)(1)(i).

[12] Case 21-E-0141, Statement of Account for Complainant (May 24, 2017) and OCS Correspondence to Con Edison (February 26, 2019) (stating that "on December 28, 2018, the meter was inspected

2016.[13] There is nothing in the record to indicate that the company attempted to provide "no-access notices" to Complainant after the second estimated bill, dated April 1, 2016. There is also nothing in the record indicating the company attempted to read the meter or notify complainant for the period of estimated billing from June 2, 2014, to January 25, 2016.

The record reflects that the earliest contact between the company and Complainant over the extended estimation period was the company's response to the Complainant's complaint on May 24, 2017. After that date, Con Edison continued to estimate usage up to an actual meter reading performed on May 31, 2019, and billed based on estimated usage up to its attempt to backbill on July 5, 2019. As noted above, Con Edison acknowledged in a letter dated January 19, 2018, to OCS that it was not the lack of access to Complainant's meter but instead lack of proper instructions to Con Edison personnel regarding the location of the meter that stopped personnel from reading the meter.[14]

Based on the foregoing, the Commission finds that from June 24, 2014, to May 1, 2019, Con Edison violated (1) §13.8(a), (2) §13.8(b)(1), and (3) §13.8(c)(1)(i) of the NYCRR by failing to adequately attempt reading Complainant's meter, continuing to estimate Complainant's electric bills while not meeting the circumstances where a utility may render an estimated bill, and

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and found to be operating and recording properly, but no evidence of an actual reading is noted in the account").

[13] Con Edison had also estimated Complainant's usage up to that date from at least June 2, 2014. Case 21-E-0141, Statement of Account for Complainant (May 24, 2017).

[14] Case 21-E-0141, Con Edison Response to OCS Directive (January 19, 2018).

failing to provide no-access notices commencing with the second consecutive bill estimated pursuant to §13.8(b)(1)(i).

2. The Company's Backbilling

Complainant does not assert impropriety on the part of the company for backbilling for May 31, 2019, to July 1, 2019. However, this issue is material to the case, as Complainant is appealing an Informal Review Decision that allows for this backbill. The main issue here is whether the previous period of estimated billing precludes the company from backbilling any portion of it.

Both the Commission's regulations and the company's tariff provide that the company shall not render a backbill for a non-residential customer "more than six months after the utility actually became aware of the circumstance, error or condition that cause[d] the underbilling."[15] The Commission has repeatedly established that "awareness" of the condition requiring a backbill is "actual knowledge of the particular condition."[16] The Commission has recently held that, "[a]n inspection or inquiry where a utility finds the actual details

[15] 16 NYCRR §13.9(b)(1); See Consolidated Edison Company of New York, Inc. Tariff, PSC N. 10 – Electric General Rules, Regulations, Terms and Conditions 10.6(a), Leaf 86.

[16] See Case 18-G-0332, Appeal by Weinreb Management of the Informal Decision Rendered in Favor of Consolidated Edison, Commission Determination (issued January 24, 2019); Case 95-E-0581, Appeal by Whale Machinery Ltd. of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., Commission Determination (issued December 5, 1997); Case 93-G-0735, Appeal by Think Realty of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., Commission Determination (issued August 9, 1995).

of the circumstance surrounding the cause of underbilling is necessary for the six-month limitation to start running."[17]

Here, the company first inspected the meter in response to the initial complaint on May 24, 2017.[18] This is the date the Company had actual notice regarding the specific location of the meter. At this point in time, the six-month limit on backbilling began to run. As the Company continued to estimate billing continuously with nothing to indicate a different condition arising, there was never a "new" issue introduced that would reset the six-month backbilling period. Thus, the company's backbilling for the period from May 1, 2019, through July 1, 2019, occurred outside of the six-month time limit that commenced on May 24, 2017. Although Con Edison cancelled the backbill for the period from May 1, 2019, through May 31, 2019, the record indicates that it has not cancelled the backbill for the period from May 31, 2019, through July 1, 2019.

While the company's records indicate that actual readings were obtained on both May 31, 2019, and July 1, 2019, the company still billed Complainant based on estimated usage for both periods, and revised the bills, based on actual usage, on or after July 5, 2019. [19] A backbill is an upward revision for charges not previously billed for service actual delivered

[17] Case 21-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 March 18, 2022), p. 9.

[18] Case 21-E-0141, Statement of Account for Complainant (May 24, 2017).

[19] Case 21-E-0141, Meter Reading Report (July 8, 2019); Statement of Account for Complainant (July 8, 2019); Con Edison Letter to OCS and Complainant (July 5, 2019).

to a customer.[20] In addition, Con Edison refers to the bills rendered for both months as backbills.[21] Based on this information, the Commission determines that the bill for the period covering May 31, 2019, through July 1, 2019 - in the amount of $1,700.37 - also constitutes an improper backbill. Therefore, the Commission directs Con Edison to cancel the backbill for the period of May 31, 2019, to July 1, 2019, and refund any overpayment with interest.

3. Complainant's Entitlement to a Refund

Complainant claims that it should be entitled to free service for the entirety of the period from February 10, 2014, to May 7, 2019. Complainant argues that the alleged deficiency of the company for its prolonged reliance on estimating usage violates applicable regulations, and that all bills for the 62-month period should be cancelled and the payments refunded with interest. The main issue here is whether the facts of this case meet the narrow circumstances where a customer can obtain free service under applicable regulations.

Complainant cites PSL §65(1) for the proposition that any billing in violation of the applicable regulations and tariff provisions should be expunged, and PSL §65(2) for the proposition that customers billed for estimated usage should be treated as a "group" with protections against how many estimates can be rendered. Complainant's requested remedy, to receive free service for this entire period, is inconsistent with the requirements of PSL §65(1) because prohibited unjust and unreasonable charges would be charges outside of those already allowed by applicable regulations. Con Edison's failure to comply with backbilling regulations is accounted for already

[20] 16 NYCRR §13.1(b)(17).

[21] Case 21-E-0141, Con Edison Letter to OCS and Complainant (July 5, 2019).

because those same regulations disallow Con Edison from backbilling for the complainant's actual usage in excess of the amount the Company billed using estimated bills during the contested period. Therefore, the estimated bills are not in violation of PSL §65(1).

Similarly, PSL §65(2) does not support Complainant's request for free service during the entire contested period. This provision simply prevents a utility from arbitrarily treating similarly situated customers differently, which is inapposite here because there is no allegation of disparate treatment compared to other customers in a similar circumstance of estimated electric usage. [22] Complainant would have to have its estimated bills calculated differently than other customers with estimated electric bills in similar circumstances to be disparately treated under PSL §65(2).

Complainant also cites PSL §67-a(2) as an example of the availability of free service but that provision precludes a utility from charging a "new commercial customer for past services received if the failure to charge for such services resulted from the faulty operation or inoperation of a metering device which the gas or electric corporation failed to inspect." However, there is no allegation that Con Edison's conduct falls within the ambit of PSL §67-a(2) and, indeed, the Complainant seems to acknowledge this point in its appeal.

The Commission has held that customers have the general obligation to pay for the utility services they

[22] See Case 20-G-0207, Appeal by Ronald Branche of the Informal Decision Rendered in Favor of Niagara Mohawk Power Corporation d/b/a National Grid (830171), Commission Determination (issued November 25, 2020), p. 5.

receive.[23] However, the Commission's regulations and the company's tariff also set limits on backbilling to reflect actual usage if a customer was previously underbilled. The company had already forfeited its ability to backbill for actual usage for periods before May 31, 2019. Additionally, as noted above, the Commission has determined that the Complainant is entitled to a refund for an additional period of improper backbilling. Outside of that single month, the Commission finds that Complainant is not entitled to any further refunds

CONCLUSION

To assure that all aspects of this case have been properly addressed, the complaint file has been thoroughly reviewed. The Commission determines that Con Edison was deficient in issuing estimated electric bills to Bay Park Two/Grenadier Realty Corp.'s over the 62-month period. The Commission also determines that Con Edison was deficient in its backbilling for the period of May 31, 2019, to July 1, 2019. However, there is no basis for Complainant to receive a refund of all charges for electric service during the entire 62-month period. The company is directed, within 30 days of the date this determination is issued, to:

1. Cancel the backbill issued for the period of May 31, 2019, through July 1, 2019, in the amount of $1,700.37 and refund with interest that amount to Complainant.

[23] 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., Commission Determination (issued November 21, 2017).

2. Inform Bay Park Two/ Grenadier Realty Corp and the Secretary to the Commission, in writing, that it has done so, and provide documentation.

Therefore, Complainant's appeal is denied in part and granted in part.