

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on October 12, 2023

COMMISSIONERS PRESENT:

Rory M. Christian, Chair  
Diane X. Burman  
James S. Alesi  
Tracey A. Edwards  
John B. Howard  
David J. Valesky  
John B. Maggiore

CASE 22-E-0666 - Petition of West 38 Res LLC to Submeter  
Electricity at 555 W. 38th St., New York, Located  
in the Territory of Consolidated Edison Company  
of New York, Inc.

ORDER AUTHORIZING SUBMETERING

(Issued and Effective October 18, 2023)

BY THE COMMISSION:

INTRODUCTION

By petition filed on November 30, 2022 (Petition), West 38 Res LLC (Owner) requests authorization to submeter electricity at 555 West 38th Street, New York. The Owner also requests confirmation that it functionally complied with the residential notice requirement of 16 NYCRR §96.3(c)(3) prior to receiving authorization to submeter. This building is a new rental building located in the service territory of Consolidated Edison Company of New York, Inc. (Con Edison). By this Order, the Commission approves the Owner's request to submeter electricity and denies the request for confirmation that it has already functionally complied with the notice requirement of 16 NYCRR §96.3(c)(3). Upon receiving this Order authorizing it to submeter electricity,

the Owner must now comply with the notice requirements of 16 NYCRR §96.3(c)(3).

PETITION TO SUBMETER

This new rental building consists of 590 units. Of the 590 units, 413 units will be provided at fair-market value and 177 units will have income criteria. The Petition states that the income-eligible units will be reserved for individuals earning different percentages of the area median income (AMI) as follows: 59 units are reserved for individuals earning at or below 70 percent of the AMI and 118 units are reserved for individuals earning at or below 130 percent of the AMI. The agency of jurisdiction for the units is the New York City Department of Housing Preservation and Development.<sup>1</sup>

The Petition states the following energy efficiency measures have been implemented: Energy Star® rated refrigerators, dishwashers, washers, and dryers, as well as energy efficient light emitting diode lighting fixtures. The Petition states that the building will use electric heat.<sup>2</sup> Con Edison will master-meter the building. The Petition states that

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<sup>1</sup> New York City Housing Preservation and Development is the agency of jurisdiction that oversee the units with varying percentages of AMI income criteria. The United States Department of Housing and Urban Development calculates AMI for each metropolitan area, parts of some metropolitan areas and each non-metropolitan county that determine eligibility for income driven housing programs. Refer to the New York City Housing Preservation and Development website for the most up-to-date AMI levels. <https://www.nyc.gov/site/hpd/services-and-information/area-median-income.page>

<sup>2</sup> The building will use vertical stack water source heat pumps with individual indoor systems for heating. Each resident's submetered electric bill will include electric usage of their corresponding heat pump. Residents will be able to control the units via programmable thermostats.

the Commission-approved Quadlogic MiniCloset-5N submetering system will be installed in the building.

Sixteen NYCRR §96.3(c)(3) requires that, upon Commission approval of a petition for submetering, the submeterer must individually notify residents no less than two months prior to the actual commencement of billing for submetered electric service. The Petition states the Owner has provided notice to current residents through individual rental agreements. The Petition also states that while residents are not currently responsible for their electric consumption, the Owner commits to provide residents with at least two months of shadow bills. Lastly, the Petition states the Owner will provide a final notification that residents will be required to pay for their submetered electric service upon Commission approval to submeter. As such, the Owner states that it will have provided current residents proper notification as required in §96.3(c)(3).

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on March 29, 2023 [SAPA No. 22-E-0666SP1]. The time for submission of comments pursuant to the Notice expired on May 30, 2023. Two public comments were received on April 10, 2023. One resident is opposed, and one resident is in favor of having residents' electricity submetered. The comment opposed to submetering believes submetering should not be approved until the building is fully occupied and construction is completed with stable electric service. The comment supporting submetering states that submetering promotes energy efficiency and individual responsibility in multi-tenant apartment buildings.

On July 17, 2023, the Owner submitted a letter in response to the above residents' comments opposing the argument that the Commission should not approve submetering while the building is under construction and occupancy of the building is not complete. The Owner argued that the level of construction and level of occupancy are not relevant to whether the Commission should approve submetering in this case. The Owner also stated that it has completed construction of the building, and the building is occupied with stable electric service.

#### LEGAL AUTHORITY

Under Public Service Law (PSL) §66, the Commission has general supervision of all electric corporations in New York State, which includes the ability to regulate the terms under which electric corporations provide electric service to their customers (in this instance, the Owner). In addition, PSL §30 et seq., constitutes the Home Energy Fair Practices Act, the statutory protections governing the furnishing of electric service to residential customers. The Commission's regulations regarding the submetering of electricity to residential customers are set forth in 16 NYCRR Part 96.

#### DISCUSSION AND CONCLUSION

The Petition to submeter electricity at 555 West 38th Street, New York, complies with 16 NYCRR §96.5 and, therefore, the Commission grants authorization to submeter electricity. In Case 20-E-0190,<sup>3</sup> the Commission clarified that building owners shall include utility energy affordability program (EAP) bill

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<sup>3</sup> Case 20-E-0190, Notice of Intent of QPP LLC to Submeter Electricity at 29-59 Northern Boulevard, Queens, New York 11101, Order Authorizing Submetering (issued March 24, 2021) (March 2021 Order).

discounts in the calculation of the rate cap, as defined in 16 NYCRR §96.1(i),<sup>4</sup> to ensure that submetered customers are afforded the same benefits and protections as direct-metered customers.

The utilities have a process to afford low-income customers the opportunity to participate in a utility's low-income EAP by providing appropriate documentation (e.g., an award letter) demonstrating that they are beneficiaries in applicable public assistance programs. Utility customers may self-identify as eligible for a utility's EAP. Upon review of the documentation provided by the customer, the utility will then enroll the customer in its EAP. In the March 2021 Order, the Commission clarified that, following a similar process, submetered residents shall be able to self-identify themselves to a submetered building owner as eligible for the relevant utility's low-income discounts, with appropriate documentation. The process for residents to self-identify described above shall be clearly stated in the submetering lease rider. The rate cap applicable to an EAP-eligible submetered customer shall be inclusive of EAP bill discounts.

Regarding the commenter's concerns in opposition to submetering, the Commission agrees with the Owner that a determination is not dependent on the completion of building construction or a specific level of building occupancy. The

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<sup>4</sup> Sixteen NYCRR §96.1(i) defines the rate cap as "[t]he maximum rate, calculated in each billing period, that may be used to compute the charges for electric service to a submetered resident. Unless a different rate cap is set pursuant to sections 96.2(a) and 96.8(b) and (c) of this Part, the rate cap shall be the rates and charges of the distribution utility for delivery and commodity in that billing period to similarly situated, direct metered residential customers. Where residents are billed for time-of-use, the maximum rate for purposes of calculating the rate cap shall be the average annual residential rate."

level of building construction or occupancy will not affect the proper provision of submetering price signals.

Pursuant to 16 NYCRR §96.6, submetered service shall be subject to the conditions set forth in this Order and the Commission's regulations in 16 NYCRR Part 96. Pursuant to 16 NYCRR §96.3(d), the Owner shall certify to the Secretary to the Commission within 60 days of the issuance of this Order that it accepts all the submetering conditions required in this Order and the Commission's regulations, and that it has, or will, provide copies of all notices required by 16 NYCRR §96.3(c)(3) to residents. Sixteen NYCRR §96.3(c)(3) requires notice to residents of submetering not less than two months prior to commencement of billing after submetering approval. Generally, a building owner will comply with 16 NYCRR §96.3(c)(3) by providing a letter to each resident that notifies the resident that submetered billing will commence in no less than two months after the Commission has authorized submetering.

The Owner requests that the Commission find it has functionally complied with the notice requirement under 16 NYCRR §96.3(c)(3). The Commission has previously found that an owner functionally complied with the residential notice provisions before the issuance of an order approving submetering through the following three actions: 1) providing notification to residents through a temporary lease rider agreement where the resident agreed to pay submetered electric bills for their own usage as soon as the Commission authorized submetering; 2) providing at least two months of shadow billing where residents were able to track their own electricity usage; and 3) will provide an additional notice to residents accompanying their final shadow bill stating that, upon Commission approval, each

resident would be responsible for the cost of their own electric usage.<sup>5</sup>

On September 26, 2023, the Owner submitted a letter stating, "it will distribute two rounds of shadow bills prior to October 12, 2023." The Owner stated these shadow bills would be for billing periods of July 31, 2023, through August 31, 2023, and August 31, 2023, through September 30, 2023. The Owner does not indicate that it had provided the shadow bill for the period of July 31, 2023, through August 31, 2023, as of September 26, 2023. Further, the Owner did not submit any information indicating that it has provided shadow bills for ongoing billing cycles in the time since it filed the Petition. The condition to shadow bill requires the Owner to provide current shadow bills over for at least two months. This provides residents the opportunity to track usage and make any modifications in reaction to the price signals. Here, the Owner has not fulfilled this condition as it indicates that its distribution of two rounds of shadow bills will be done almost simultaneously for billing periods that have already passed, denying customers the ability to track their own usage. Therefore, the Commission denies the Owner's request for confirmation that it has functionally complied with the notice requirements of 16 NYCRR §96.3(c)(3) prior to the authorization to submeter granted in this Order. Accordingly, the Commission requires that the Owner, now having received authorization to submeter, comply with 16 NYCRR §96.3(c)(3). Thus, the Owner must now provide

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<sup>5</sup> See Case 12-E-0460, Petition of 2130 ACP Boulevard Investors LLC, Declaratory Ruling on the Adequacy of Notice of Tenants, (issued April 25, 2013); Case 22-E-0199, Petition of 417 East Realty Limited Partnership to Submeter Electricity at 417 East 57th Street, New York, New York, Located in the Territory of Consolidated Edison Company of New York, Inc, Order Authorizing Submetering (issued November 23, 2022).

residents with at least two months' notice of the date submetering will commence and provide residents with at least two months of timely shadow bills during that period.

The Owner shall file with the Secretary to the Commission, within 12 months of the date of this Order, certification that the Owner has had the MiniCloset-5N submeters installed. Additionally, within 12 months of the date of this Order, the Owner shall file a meter test plan detailing its annual testing program, in accordance with the testing procedures and standards outlined in 16 NYCRR Part 92. The Owner shall file the meter test plan with the Secretary to the Commission under this case and case 11-M-0710.

If building ownership or property management is transferred, the current Owner shall provide the prospective owner or property manager with written notification that the building is submetered. Such notification shall include a copy of the submetering requirements set forth in 16 NYCRR Part 96 and this Order. Pursuant to 16 NYCRR §96.6(i), the Owner, or any future owner, shall update the information contained in the "Submeterer Identification Form" and submit the form to the Secretary to the Commission as a record to this case within 10 days of any changes to the information provided therein.

The Commission orders:

1. West 38 Res LLC is authorized to submeter electricity at 555 West 38th Street, New York, subject to the conditions in the body of this Order.
2. West 38 Res LLC shall, within 60 days of the date of this Order, certify in writing to the Secretary to the Commission that it accepts all the submetering conditions required in this Order and the Commission's regulations, and that it has, or will, provide copies of all required notices to

its residents and to new ownership or property management as applicable.

3. West 38 Res LLC is directed to notify current residents individually of the date upon which submetering will commence, on not less than two months' notice.

4. West 38 Res LLC shall file with the Secretary to the Commission, within 12 months of the date of this Order, certification that the MiniCloset-5N submeters have been installed.

5. West 38 Res LLC shall file with the Secretary to the Commission, within 12 months of the date of this Order, a meter test plan in Cases 22-E-0666 and 11-M-0710.

6. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least three days prior to the affected deadline.

7. This proceeding is closed pending compliance with the above Ordering Clauses.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS  
Secretary