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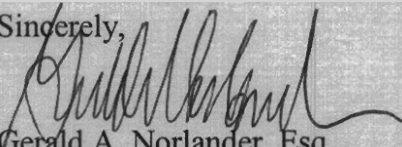
May 18, 2007

Hon. Jaclyn A. Brillig
Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

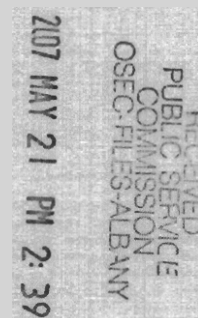
Re: Proposed Rulemaking - Rider 1 - Experimental Rate Program for Multiple
Dwellings - SAPA Notice - ID No. PSC-18-07-00012-P

Dear Secretary Brillig:

Enclosed for filing are the original and five copies of the Comments of the Public Utility Law Project of New York, Inc. on Con Edison Tariff Rider 1 - Experimental Rate Program for Multiple Dwellings, in response to the Commission's SAPA Notice ID No. PSC-18-07-00012-P, published in the State Register May 2, 2007 at p. 15.

Sincerely,

Gerald A. Norlander, Esq.
Executive Director

cc: All parties in Case 04-E-0572 (via email)



**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**In the Matter of Con Edison's Filing
of Tariff Rider I, Experimental Rate
Program for Multiple Dwellings**

SAPA ID No. PSC-18-07-00012-P

**COMMENTS OF THE PUBLIC UTILITY LAW PROJECT
ON CON EDISON TARIFF RIDER I
EXPERIMENTAL RATE PROGRAM FOR MULTIPLE DWELLINGS**

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The Public Utility Law Project of New York, Inc. ("PULP") submits the following comments on the April 13, 2007 tariff filing of Consolidated Edison Company of New York, Inc. ("Con Edison") to adopt a new "Rider I – Experimental Rate Program for Multiple Dwellings" ("Rider I").¹ This tariff would affect electric service and rates to residential tenant consumers in up to 35 multi-family housing projects and multiple dwellings where the Commission previously allowed submetered electric service. The tariff accommodates owners of such projects who seek to implement NYSERDA-sponsored real time pricing experiments, referred to in the tariff filing as "NYSERDA's Multi-Family Pilots for Time Sensitive Prices, Demand Response and Load Management."

The exact number of tenants who would be charged "Time Sensitive Prices" in the experimental programs is not known. There may be tens of thousands of tenants, and many more household members, affected by the experiments.

¹ Notice of Con Edison Tariff Rider 1 - Experimental Rate Program for Multiple Dwellings, to become effective July 1, 2007, was published as SAPA ID No. PSC-18-07-00012-P in the New York State Register May 2, 2007 at p. 15.

The experiment is apparently designed to find out how dramatic price differentials will affect residential customer electricity usage and related behavior. PULP has serious concerns regarding consequences of any real time pricing experiments for low and fixed income households.²

There is no requirement in the tariff filing to ensure that submeterers have informed written consent of each of the experiment's residential participants. Nor is there any tariff requirement to ensure that all residents of the premises where the experiments are to take place are notified that their participation in the experiment is voluntary, that they are notified of their continued right under Commission regulations to receive price-capped submetered service at rates no higher than Con Edison's tariffed rate for residential service to direct customers. The Commission has previously declared that consent of submetered residential consumers to time of use pricing is required, but the proposed tariff fails to recognize the Commission's policies and fails to require compliance with them by submeterers as a condition of service to them under Rider I.

For the reasons stated below, PULP seeks modification of the Con Edison-proposed tariff changes to require that the submetering customer seeking service under Rider I must supply evidence of informed, written consent to real time pricing from each tenant participating in the experiment, and written notification to each tenant of

- voluntariness of participation in any time sensitive pricing experiment
- the right to continued price capped service under Commission regulations

² See *Not so Smart? High Tech Metering May Harm Low Income Electricity Customers*, available at <http://pulpnetwork.blogspot.com/2007/04/not-so-smart.html>

- the right to revoke consent and return to price-capped service, and
- the right to complain to the Commission regarding grievances arising from administration of the time of use pricing experiment.

Without such protection, PULP believes that some participants may be switched to time of use service without their active consent, and may suffer significant hardship and possible eviction due to higher bills for service at time of use rates.

1. **Participation of Residential Consumers in any Real Time Pricing Experiment Must be Voluntary**

State law bars utilities and the Commission from implementing involuntary residential time of use rates. As the Commission stated, in the context of its recent consideration of time of use rates:

The Commission is not authorized to mandate time-of-use rates for residential customers. . . . Chapter 307 of the Laws of 1997 amended [New York] Public Service Law § 66(27)(a) to delete a provision authorizing the Commission to mandate time-of-use rates for residential customers, in the public interest.³

Public Service Law § 66(27)(a) allows no exception for any involuntary time of use price “experiments.” Indeed, the law requiring voluntariness in the provision of any residential time of use service was inspired by negative customer feedback from a prior Commission experiment. The Commission had required time of use service for residential customers whose usage was well above the norm:

New York previously had a mandatory time of use rate for very high usage

³ *In the Matter of Competitive Opportunities Regarding Electric Service, In the Matter of Competitive Metering Proceeding on Motion of the Commission to Investigate Competitive Metering for Gas Service*, Case 94-E-0952; Case 00-E-0165; Case 02-M-0514, New York Public Service Commission, (Issued August 1, 2006).

residential electric customers. Despite the presumed ability of very high usage customers to adapt to time of use rates, *the program was so unpopular the state legislature amended the law to make any residential time of use program voluntary.*⁴

Con Edison represents in its tariff filing that NYSERDA “will be implementing Multi-Family Pilots for Time Sensitive Prices, Demand Response and Load Management.”⁵ The proposed Con Edison Rider I tariffs do not contain any requirement that residential participants have actively requested the time of use rates to be charged in the experiment. Con Edison supplies no assurance in its filing that the NYSERDA program contains provisions for truly voluntary participation, notice of the opportunity of participants to return to price-capped service, and notice of the Commission’s complaint procedures.

The Commission previously held that submetered residential consumers must consent to any service with real time pricing. The Commission stated in a Declaratory Ruling:

We caution potential submeterers interested in billing customers based upon RTP and TOU rates that we will apply the policy expressed in PSL §66(27)(a), and require that the consent of residential customers in buildings converting to submetering must be obtained before they may be billed at RTP or TOU rates. * * * Submetering plans proposing to implement RTP or TOU rates must provide a means for customers *to actively choose whether or not they wish to take service under such rates*. Submeterers also should hold informational meetings with residents to explain the proposed RTP or TOU rates and to answer residents’ questions. Customers that *decline to acquiesce to submetered service* at RTP or TOU rates should be billed at a rate not to exceed the applicable rate for directly

⁴ Barbara Alexander, *Smart Meters, Real Time Pricing, and Demand Response Programs: Implications for Low Income Electric Customers*, p. 5 http://www.pulp.tc/Smart_Meters_Real_Time.pdf

New York’s experience with mandatory real time pricing was not atypical. “Maine’s mandatory TOU rate program, adopted at a time of price stability, was abandoned with a dramatic increase in electricity prices and the onset of electric restructuring. Puget Sound Energy in Oregon abandoned a system-wide move to TOU pricing for residential customers when it became clear that the additional costs of the new communication and billing systems could not be avoided with average monthly bill savings.” *Id.*

⁵ Con Edison Rider I tariff filing letter, April 13, 2007, p. 2.

metered residential service.⁶

The Commission should modify Rider I to make clear that it is the obligation of the submeterer seeking service under the tariff to demonstrate that affirmative “consent of residential customers” has been “obtained” to time of use pricing, and that the service with real time pricing is only provided to those customers who, in the words of the Commission, “actively choose” to participate.⁷

This would eliminate possible confusion arising from the Commission’s reference in the same Declaratory Ruling to customers who “*decline to acquiesce to submetered service*,” which might suggest, incorrectly, that a landlord could convert all tenants to time of use pricing except those who object. Such a reading is inconsistent with the governing statute and the Commission’s requirement that participating consumers “actively choose” time of use service. It would also be contrary to the Commission’s general policy against “slamming” of customers into potentially more expensive services they have not affirmatively requested.

Tenants who are elderly, disabled, who have mental impairments, who may not be literate, or who may not understand that their electric bills could increase dramatically absent a change in their behavior and usage habits could be placed at great risk by any “opt out” procedure. Those without savings to pay unexpectedly high bills could be severely disadvantaged before they switch back to price capped service. Others may suffer hardship, and

⁶ Case 04-E-1335 - Petition of the Cooperative Coalition to Prevent Blackouts for a Declaratory Ruling Regarding Application of 16 NYCRR Section 96.2, Residential Submetering, to Multi-family Buildings Eligible to Purchase Electricity in Accordance with Real Time Prices from a Regulated Utility or Energy Services Company. *Declaratory Ruling on the Submetering of Residential Customers at Time of Use Rates* (Issued June 8, 2005) (*Emphasis added*).

⁷ *Id.*

perhaps be subject to eviction proceedings brought by the submeterer if they cannot pay the higher charges.

The Con Edison tariff needs to incorporate the policy of voluntary participation because it cannot be assumed that submeterers and their tenants who were not parties to the 2005 proceeding are actually aware of their respective responsibilities and rights under the Commission's Declaratory Ruling. It appears from the Declaratory Ruling quoted above that the only parties to that proceeding were one proponent of real time pricing for submetered consumers and the City of New York. NYSEDA apparently was not a party. Significantly, the City of New York took a firm position that consumer participation must be voluntary.⁸

The Commission cannot effectively enforce its Declaratory Ruling regarding submeterers if service is allowed under Con Edison's proposed Rider I tariffs with no assurance provided to the utility by applicants for Rider I service that affirmative consents have been obtained from residential participants in the experiment, that customers were notified of their right not to participate in the experiment, notified of their right to continued service at price capped rates, and notified of Commission remedies for complaints arising under the experiment.

The Commission should not approve Rider I without requiring Con Edison to modify the proposed tariff to require the owners to demonstrate they have consent of each of the participants who would be charged time of use rates. As a prerequisite, the submeterer seeking service under Rider I must supply evidence of informed written consent to real time pricing from each tenant

⁸ While *opposed to mandatory participation* in RTP or TOU arrangements, the City maintains that demonstration projects, where *participation would be voluntary*, are an important step in advancing the goals of expanding public awareness of the availability and the potential economic benefits of RTP. *Id.* (*Emphasis added*).

participating in the experiment and (i) notification to each tenant of their rights with respect to continued price capped service, (ii) notification to each tenant of the voluntariness of participation in a time sensitive pricing experiment, (iii) notification of the right to revoke consent and return to price-capped service at any time, and (iii), specific written notice to each residential consumer of the consumer's right to complain to the Commission regarding administration of the time of use pricing experiment.

With respect to the last item, the Declaratory Ruling recognizes that HEFPA governs service to submetered consumers, and that "customers switched to RTP or TOU rates without their consent could file complaints seeking relief from the unwanted rate structure under the Home Energy Fair Practices Act (HEFPA)."⁹ Similarly they could complain to the Commission regarding billing errors or other matters.¹⁰ This right to seek Commission remedies, however, may be largely illusory if submeterers are not required to demonstrate, as part of their application for service under Rider I, that they have written consent of each residential participant in a real time pricing experiment and that they have notified all tenants that they may complain to the Commission regarding matters that arise during implementation of the experiment.

⁹ *Id.*, at 7.

¹⁰ Information received by the Commission in the course of handling customer complaints may also be useful in evaluating the experiment and its effects on residential customer behavior.

2. Non Consensual Time of Use Metering Would Disadvantage Submetered Residential Electric Consumers Contrary to Commission Regulations and Orders Designed to Regularize Submetering by Treating Submetered Consumers No Worse than Direct Customers of the Utility

A. Submetering of Electric Service by Landlords Is Not Authorized by the Public Service Law

Longstanding court precedent has established that landlords cannot sell electricity to tenants:

It was found that the practice of submetering is parasitic and undesirable, competing with the central service station by selling to ultimate consumers who would be otherwise customers of the company. Profits of the submeterer would otherwise be available for the reduction of rates to other customers or aid in maintaining the level of rates in a period of rising costs. Under the present provisions of the Public Service Law service to the customers of a submeterer cannot be regulated although *such users should be entitled to the same protection as a direct user of the company's service*. These findings are not only supported by the record but, in our opinion, are almost self-evident propositions, requiring but slight proof to support them.

Campo v. Feinberg, 279 A.D. 302 (3d Dept. 1952), *affirmed* 303 N.Y. 995 (1952) (*emphasis added*).¹¹ More than 25 years after the 1952 court decision,¹² and without new statutory authorization, the Commission again revived residential submetering. The Commission has explained this re-emergence of submetering as follows:

Under PSL § 2(13), landlords may redistribute electricity to their tenants without falling within the ambit of the definition of an electric corporation, so long as the cost of the electricity is included in rent. While redistribution by landlords is therefore not regulated, the resale of electricity by landlords to commercial and industrial tenants was prohibited in the 1950's. [*footnote citing Campo v. Feinberg*] With the issuance of Opinion No. 79-24 in 1979, resale was again permitted, if

¹¹ Available at <http://www.pulp.tc/CampovFeinberg.pdf>

¹² *Campo v. Feinberg, supra*, was affirmed by the New York Court of Appeals, the State's highest court, and its interpretation of the Public Service Law regarding submetering has not been superceded by legislative changes.

deliveries were made via submetering, *upon obtaining our prior approval for specific submetering arrangements.*¹³

The quotation above suggests that the court decision in *Campo v. Feinberg, supra*, applied to “commercial and industrial customers” and perhaps did not apply to residential customers. The first sentence of the decision in *Campo*, however, recounts that the case involved cessation of a longstanding practice – more than 40 years – of Consolidated Edison Company of New York, Inc. “selling electric current to landlords for the purpose of resale to *residential* tenants.” *Campo v. Feinberg*, 279 A.D. 302, 303 (3d Dept. 1952), *aff’d* 303 N.Y. 995 (1952) (*Emphasis added*). Thus, the *Campo* decision is fully applicable to Con Edison residential service and submetering.

Apparently, the Commission has sought to distinguish its revival of submetering by attempting to structure the service so that submetered residents are “entitled to the same protection as a direct user of the company’s service.” *Campo v. Feinberg, supra.*¹⁴ As discussed below, the Commission needs to take steps to assure protection of the residential consumers in premises where the Rider I service will be introduced.

¹³ E.I. Du Pont De Nemours & Company and Olin Corporation - *Petition to Continue the Current Redistribution To Olin Corporation of Electricity Delivered By Niagara Mohawk Power Corporation to E.I. Du Pont De Nemours & Company*, Case 97-E-1846, January 28, 1998. (*Emphasis added*).

¹⁴ These efforts, however, are not always sufficient to provide submetered consumers with protection equivalent to direct customers. For example, Con Edison lacked information necessary to identify submetered residential consumers with medically necessary and life sustaining electrical equipment during the July 2006 outages in the Long Island City network, because they were not direct customers.

Also, the protection of PSL § 65-b is not available to submetered customers owing arrears for past service, because emergency HEAP and public assistance under SSL § 131-s to pay bills to resolve threatened utility shutoffs is not available when electric service is provided by a submeterer.

B. Continued Price-Capped Service is Required for Submetered Customers who Have Not Actively Requested Time of Use Service.

The “specific submetering arrangements” established by the Commission when it reintroduced submetering apparently were designed so as to place submetered consumers in no worse position than they would be if they had remained direct customers of the utility.¹⁵ As previously discussed, the Public Service Law prohibits any mandatory residential time of use service. To be charged time of use rates, a direct customer of Con Edison must affirmatively request a change of service classification. Submetered customers would be disadvantaged in comparison to direct customers if they were to be shifted to time of use service without their having requested it.

The Commission, in its Declaratory Ruling on submetered real time pricing, allowed residential submeterers who offer time of use pricing to their tenants to satisfy the price cap requirement of the Commission regulations and submetering orders by comparing the annual aggregate of bills charged to all participating tenants with the aggregate charges that would have been collectible under standard utility tariffs. Under the Rider I “experimental” time of use

¹⁵ For example, the Commission’s submetering regulation provides that landlords seeking submetering approval must include: the method and basis for calculating rates to tenants, which shall include a maximum rate provision (rate cap) preventing charges to tenants from exceeding the utility’s tariffed residential rate for direct metered service to such tenants; complaint procedures and tenant protections consistent with the Home Energy Fair Practices Act. . . .

16 NYCRR § 96 (b)(3).

Similarly, submetering orders issued by the Commission for each building being submetered include standard requirements that tenants be provided HEFPA protection and that a submeterer’s rates be no higher than would be charged for direct service. Commission submetering orders typically recite that “[i]n no instance will the total charges (including administrative charges allowed by DHCR) exceed Con Edison’s direct metered residential rate.” Case 06-E-1232, Petition of Stellar Management, on Behalf of Highbridge House Ogden, LLC, to Submeter Electricity at 1133 Ogden Avenue, Bronx, New York, Located in the Territory of Consolidated Edison Company of New York, Inc., filed in C26998, (Issued Jan. 21, 2007).

service, some residential consumers may be charged rates far higher than the rates they would pay if they were a direct customer, and their bills will be higher, even if some other tenants can save money by shifting usage to off peak hours. The *average* annual price cap will not protect *individual* customers who cannot reduce usage or shift it to off peak hours, and whose bills may increase far beyond their ability to pay. As a recent DOE-funded report observes:

The push to install more expensive smart meters (and their associated communication and data storage systems) and consider more "real time" or volatile electricity prices for residential electric customers has the potential for significant harm to many residential customers and particularly to limited income and payment troubled customers.¹⁶

Continuation of price-capped service is the only way to protect individual consumers, for example, those with limited means and respiratory problems requiring air conditioning throughout the day in hot weather. Without continued access to price capped service these consumers may not be able to afford the service they need, and as a result, may suffer hardship or be unable to pay higher bills. Indeed, because it is the landlord who provides the electric service, they may be evicted.¹⁷

Eviction of tenants for failure to pay spiking time of use bills is not a remote possibility.¹⁸

¹⁶ Barbara Alexander, *Smart Meters, Real Time Pricing, and Demand Response Programs: Implications for Low Income Electric Customers*, p. 4.

¹⁷ Cutting statutory corners and limiting residential consumer rights and remedies cannot be justified on the assumption that the experiment will be effective in reducing environmental impacts or lowering prices. Peak shifting by program participants could shift usage to times when incremental load is met by greater use of lower cost coal fired facilities that emit more greenhouse gases, while producers and sellers, to maintain high prices, may react to any significant demand response with economic or physical withholding, new spot market bidding strategies, or delay in building new capacity to maintain tight supply.

¹⁸ PULP has received reports of eviction proceedings triggered by nonpayment of charges for submetered electricity.

Indeed, NYSERDA, sponsor of the experiment, has issued a publication for landlords suggesting that they evict submetered tenants with unpaid bills as a way to avoid compliance with “burdensome” requirements of HEFPA and the Commission’s HEFPA rules:

65. What can an owner do if a resident fails or refuses to pay submetered electric charges?

There are two potential remedies for an owner if a resident fails or refuses to pay submetered electric charges. One is to discontinue supplying the electric service. The other is to sue for either recovery of the unpaid amounts *or eviction*.

As noted in the section discussing PSC requirements, New York State has extensive regulations in place to protect residents against their electric service being shut off. An owner seeking to continue the tenancy while discontinuing the service will most likely be required to comply with all tenant-protection regulations applicable to utilities for discontinuing the service. These include various notice and payout requirements and protections for the elderly and disabled, which are time-consuming, burdensome to the owner, and inconsistent with continuation of the rental tenancy. Moreover, special arrangements with respect to electric charges are likely to cause confusion in billing and collection procedures. As a result, owners may want to consider legal action for eviction of the resident or recovery of unpaid amounts as the primary enforcement mechanism for nonpayment of submetered electric charges.¹⁹

NYSERDA is thus actively suggesting to submetering landlords that they consider evicting tenants who cannot afford submetered electric bills in lieu of following the HEFPA rules, such as budget billing and requiring offers of reasonable deferred payment agreements for customers with arrears. The Commission needs to take action to assure that the consequences of the NYSERDA experiment are not eviction, displacement, or homelessness of poor, elderly and disabled consumers who have not affirmatively made informed choices to take service at time of use pricing.

In these circumstances, it is incumbent upon the Commission to assure that participation

¹⁹ NYSERDA Residential Submetering Manual, p. 30 (*emphasis added*), available at <http://www.nyserda.org/publications/SubmeterManual.pdf>

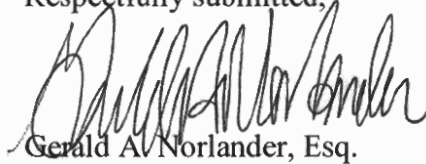
of residential consumers in NYSERDA's real time pricing programs is truly voluntary, as required by Public Service Law § 66(27)(a), and that the participants are aware of the Commission's complaint procedures regarding disputed bills, deferred payments, budget billing and any other service issues that may arise during the experiment. Accordingly, the proposed tariff Rider I should be modified as previously discussed in order to assure voluntary participation by residential consumers, continued service under the price cap provision to consumers not actively choosing to participate in the experiment, and to assure that new notices of the availability of Commission complaint procedures all provided to all participants in the experiments.

CONCLUSION

For the reasons stated above, the Commission should reject or modify Con Edison's tariff filing for a new "Rider I – Experimental Rate Program for Multiple Dwellings." The Commission should require Con Edison to condition service under Rider I by requiring submetering customers to supply evidence of (i) notification to each residential tenant of their right to continued price capped service, (ii) notification to each residential tenant of the voluntariness of participation in a time sensitive pricing experiment, (iii) notification of the tenant's right to revoke consent and return to price-capped service, (iii) informed written, consent to real time pricing from each tenant participating in the experiment, and (iv) notice to the residential consumers of a right to complain to the Commission regarding administration of the time of use pricing experiment.

May 18, 2006

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Gerald A. Norlander", is written over a light gray rectangular background.

Gerald A. Norlander, Esq.

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