

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 03-G-0743 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures—Cross Appeals by the Ciampa Organization, et al., and by Consolidated Edison Company of New York, Inc., of the Informal Decision Rendered Partially in Favor of the Ciampa Organization, et al. (213564).

COMMISSION DETERMINATION ON REHEARING
(Issued and Effective March 21, 2011)

By petition filed December 22, 2010, Consolidated Edison Company of New York, Inc. (Con Edison or the utility) requests rehearing of a Commission determination issued November 22, 2010 (the original determination), modifying an informal review decision. By letter filed December 24, 2010, Ciampa Organization, et al. (complainants) oppose the petition.¹ Upon consideration of Con Edison's petition, and upon examination of the language of its filed rate statements describing rate category distinctions relevant to this matter, we grant rehearing and reverse our prior determination that refunds were warranted.²

BACKGROUND

At all relevant times complainants received gas heating service for apartment buildings under the utility's dual-fuel interruptible Service Classification (SC) No. 12. The

¹ Complainants are represented by Utility Rate Analysis Consultants (URAC). Eleven separate accounts serving separate buildings are at issue.

² Con Edison moved on January 10, 2011, for interim relief, pending resolution of its rehearing petition, from the requirement that it pay refunds in accordance with our original determination. That motion is properly before the Commission (Public Service Law §22). In light of our current determination, however, the request for interim relief is moot.

interruptible service was provided to complainants' accounts at the relevant residential rates (or residential base rates). According to the utility, residential (in contrast to non-residential) rates have been available since introduction of the interruptible rate in 1988, and reflect a customer's "use of service for residential purposes," based on the customer's certification—on a state Tax Department form (TP-385 form) filed with the utility to request reduction of sales tax—that its usage is primarily for residential purposes.³ From 1988 through April 30, 1996, the utility's tariff included a provision (with language varying over the years) indicating the basis for billing interruptible customers on residential base rates. Immediately before May 1, 1996, that provision, Special Provision J of SC No. 12, read:

With respect to Customers with dual-fuel facilities, the rates for Priorities A through E will recognize the Petroleum Business Tax [PBT] imposed by Article 13-A of the New York Tax Law. The Company shall consider the Customer's use of oil to be residential only if the Customer has supplied the Company with written documentation of such residential usage for purposes of the [PBT]⁴

That provision reflected the fact that interruptible gas is priced to compete with the cost of a customer's alternative fuel and that, in setting prices, one factor which may be taken into account is whether the PBT applies to the customer's use of oil. Since use of oil for "residential heating purposes" is exempt from the PBT, a certification by the

³ Utility's appeal of the informal review decision (utility appeal), pp. 1-2, 7, and rehearing petition, p. 1.

⁴ PSC No. 8-Gas, SC No. 12, Special Provision J, 10th Revised Leaf No. 61 (effective April 21, 1993, to May 1, 1996).

customer that its usage of oil (or gas) is for residential heating purposes indicates that the customer's oil purchases are PBT-exempt⁵ and provided a basis for billing apartment building owners on a residential base rate. In its rehearing petition, the utility states: "This language appeared in the tariff until May 1996, when the Commission authorized a different pricing methodology for gas service that was not going to take the PBT into account in pricing gas service for the highest priorities of service."⁶

Somewhat similar language (indicating that "residential" rates apply with respect to SC No. 12 customers based on the proportion of residential usage "certified by the customer on Form TP-385 as [being] for residential purposes") was reinstated effective January 1, 2003, but was placed in the General Information portion of the tariff in a section on "Increase in Rates Applicable in Municipality Where Service is Supplied."⁷ The utility's appeal (pages 7-8) acknowledged that no similar language was included in the tariff again until January 1, 2003. However, on rehearing the utility argues that a tariff provision effective January 1, 2002 (a predecessor to the provision effective January 2, 2003) provided the necessary information; given our overall conclusions the point is

⁵ New York Tax Law §301-b(d)(1). Oil sold for residential heating purposes has been exempt from the PBT for many years (at least back to 1985, if not earlier). In 1999, a partial non-residential heating exemption (§301-b[d][2]) was added.

⁶ Rehearing petition, p. 4.

⁷ PSC No. 9-Gas, General Information, VIII, Leaf No. 169. This provision contains no reference to the PBT.

unimportant, but we do not agree.⁸ The record contains forms complainants originally submitted to the utility to certify residential use for purposes of obtaining the sales tax reduction, which show that the same Tax Department form is used for certifying residential use with respect to either a claim for an exemption from the PBT or from the state sales tax on any fuel.

Residential base rates, which the utility states had been lower than (or equal to) non-residential base rates since at least May 1996,⁹ became more expensive in March 2000. Complainants received service at residential base rates, but complained in April 2002 that such rates did not apply to them

⁸ The provision effective from January 1, 2002, to January 1, 2003 (PSC No. 9-Gas, 2nd Revised Leaf No. 169) stated: "For purpose of applying the appropriate percentage increase in rates and charges, the term 'residential service' will apply to customers where 75 percent or more of the usage has been certified by the customer on Form TP-385 as for residential purposes. All other customers are deemed to be taking non-residential service for the purpose of this Section VIII. The utility indicates on rehearing that, for interruptible customers certifying less than 75% residential usage of gas service, it prorates such customers' bills on the applicable residential and non-residential base rates (see rehearing petition, p. 7). It also states that an interruptible customer certifying at least 75% residential usage is treated as "fully eligible for residential rates" and is not subject to any proration (id., n. 7). Since the tariff provision effective January 1, 2002, to January 1, 2003, would not permit any proration in the case of SC No. 12 interruptible customers, while the provision effective since January 1, 2003, is consistent with proration for such customers, we conclude that the earlier provision was not applicable to SC No. 12 interruptible customers.

⁹ Utility appeal, p. 4.

because none of them met the tariff's definition of a "residential customer."

Our original determination found that the utility's tariff established no criteria for assigning an SC No. 12 interruptible customer to a residential, as opposed to non-residential, base rate from May 1, 1996, to January 1, 2003.¹⁰ Absent terms and conditions in the tariff for application of the more expensive base rate to complainants in March 2000 (when the residential base rate became the more expensive of the two), we concluded that complainants were entitled to rebilling at the lower non-residential base rate for the intervening period (less than three years) until January 1, 2003, when language stating such criteria was restored to the tariff.

POINTS ON REHEARING

On rehearing, the utility claims the original determination was incorrect and should be reversed for the following reasons:

1. The original determination errs in ignoring "the fact that the residential rate option must be elected by the customer in writing" and the utility therefore did not assign these customers to that base rate, and ignores the fact that complainants had benefited from the residential rate for many years before it became the more expensive option.
2. The original determination fails to acknowledge that in past determinations the Commission has

¹⁰ Tariff provisions existed until May 1, 1996, and again beginning January 1, 2003, that indicated the basis for placing an interruptible customer on the residential (as opposed to the non-residential) base rate. See the original determination, pp. 11-12.

stated that, "so long as the Company has fulfilled its tariff obligation to assist the customer in providing appropriate information," the customer must inform the utility of facts known only to it bearing on the rate at which it should receive service, and absent information indicating a change in the customer's manner of using gas, the utility is not responsible for advising a customer of changes "that do not affect the character of service the customer designated to the Company."

3. The original determination is inconsistent with past determinations of the Commission that "printed material circulated to customers" provides adequate notice.
4. The Commission determination (Everything for Living Space)¹¹—relied on in the original determination for the proposition that "the criteria for a utility rate are terms and conditions of the rate that must be stated in the tariff itself"¹²—does not apply.

The utility also makes a series of arguments, to be considered if the Commission declines to reverse its original determination, that the refunds ordered should be modified. In view of the conclusion reached in this determination, there is no need to describe those.

¹¹ Case 02-C-0916, Appeal by Everything for Living Space, Commission Determination (issued September 23, 2005).

¹² Original determination, pp. 10-11.

COMPLAINANTS' RESPONSE

By letter dated December 24, 2010, complainants state:

1. The utility's arguments were addressed in the original determination, and no error or new circumstance requiring a change in the determination has been demonstrated.
2. Complainants did not choose the higher residential base rate but were unilaterally placed on it by the utility, through the utility's improper reliance on "a form used for sales tax purposes (TP-385) ... to classify complainants' account on the residential rate of Service Classification 12."¹³ In addition to the case relied on in the original determination (Everything for Living Space) for the proposition that "the utility had to establish in its tariff proper terms and conditions for distinguishing between the two base rates,"¹⁴ Case 07-G-0789 (Sayville Schools)¹⁵ distinguishes between utility guidelines (or bulletins) for their employees on applying the utility's regulations and the tariff and makes the point that such guidelines "'must be read together with the language of the tariff, which, unlike a bulletin, has the force of law.'"¹⁶

¹³ Response to Petition for Rehearing, p. 2.

¹⁴ Original Determination, p. 10.

¹⁵ Case 07-G-0789, Appeal by Sayville Schools, Commission Determination (issued October 18, 2010).

¹⁶ Response to Petition for Rehearing, p. 2, quoting Sayville Schools.

3. The refund period stated in the Original Determination should be extended to the present and the utility directed to put proper language in its gas tariff defining the residential and non-residential base rates.

Complainants also respond to the utility's alternative arguments that should reversal of the determination be denied, the refunds ordered should nevertheless be reduced.

DETERMINATION

Our rules provide that "[r]ehearing may be sought only on the grounds that the commission committed an error of law or fact or that new circumstances warrant a different determination."¹⁷ Some of Con Edison's arguments on rehearing¹⁸

¹⁷ 16 NYCRR §3.7(b).

¹⁸ These arguments include the following: complainants benefited from assignment to the residential base rate for years prior to January 2000 (according to the utility's rehearing petition, n. 12, six of complainants' accounts began receiving interruptible service before 1996, and the other five accounts began receiving service between 1996 and 1998); they also benefited from the sales tax reduction based on certification to the utility of a certain percentage of residential use, and in no case sought to have their sales tax status altered; they were informed of the basis for billing on the residential base rate by the tariff until May 1, 1996, and by utility brochures sent to all non-residential customers (rehearing petition, p. 12); and the utility's interruptible service "has had multiple rate options," not just residential and non-residential base rates (*id.*, p. 1, regarding those options, see n. 8, above). Also, while terms and conditions of a rate are normally stated in a utility's tariff and Everything for Living Space makes that point, Con Edison may be correct that—because the circumstances in that determination were indeed different from those present here—its relevance here may be limited. However, we need not consider that issue further, because tariff and filed rate statement language controls.

suggest problems in our original determination and, together with further review of the utility's relevant tariff provisions and their genesis, indicate a significant error in the premise of our original determination, which leads us to conclude that the result reached was incorrect.

Before discussing the issues that cause us to grant rehearing, we note that the original determination properly concluded that complainants, as owners of apartment buildings, are not residential customers (either in terms of our regulations or the utility's tariff) but non-residential customers. Moreover, we correctly determined that characterization of a rate as being "residential" does not, by itself, preclude application of that rate to a non-residential customer.¹⁹

1. The interruptible base rate classifications were properly moved from the tariff to the monthly rate statements.

Our original determination relied upon the elimination from the utility's tariff, effective May 1, 1996, of a longstanding provision applying a residential rate to PBT-exempt customers if they "provided written documentation of . . . residential usage for purposes of the [PBT]." However, upon further review, we find that Con Edison did not eliminate the distinction between residential and non-residential rates for interruptible gas customers. Rather, tariff revisions authorized by the Commission, effective May 1, 1996 (which remain in effect with only minor changes), gave Con Edison authority to define and alter the categories of interruptible base rates in the monthly statements filed in accordance with its tariff, instead of in the tariff itself.

¹⁹ See the original determination, p. 10.

In a November 9, 1995, filing with the Commission (Case 95-G-1055), Con Edison proposed to replace its existing tariff provisions describing categories of interruptible rates with provisions that would enable it "each month ... [to] determine how it will establish its interruptible rates, retaining the flexibility to use the existing five SC 12 categories or to replace them with a greater or fewer number of categories" (emphasis added).²⁰ In order to allow greater flexibility in pricing gas service for "non-core market" interruptible customers, Con Edison proposed to take the categories of interruptible base rates out of its tariff and move them into in its monthly rate statements filed with the Commission.²¹ By order issued March 28, 1996, the Commission approved Con Edison's proposal with one modification.²²

The resulting tariff amendments, giving the utility discretion in establishing interruptible base rates and requiring that the eligibility requirements for various base rates be summarized only in the rate statements, took effect May 1, 1996.²³ As a result, the priorities (and their

²⁰ See utility appeal, p. 2, quoting the November 9, 1995, tariff filing. The filing was dated November 8, 1995, but Commission records indicate it was filed on November 9, 1995.

²¹ Utility appeal, pp. 2-4.

²² Case 93-G-0932, et al. (including Case 95-G-1055), Restructuring of the Emerging Competitive Natural Gas Market, Order Concerning Compliance Filings (issued March 28, 1996), p. 37. The specified modification of the proposal was "so that rate categories are changed no more frequently than quarterly with 30 days prior notice to affected customers."

²³ Before May 1, 1996, the monthly rate statements contained only the actual prices for interruptible base rates (at least back to January 1989). Until May 1, 1996, the five categories of

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eligibility requirements) were no longer specified in the tariff itself, but only in the SC No. 12 monthly statements of base rates for interruptible Rate 1.²⁴ Most of the changes are summarized in the following tariff provision, effective May 1, 1996:

The Statement of Rates shall define categories of rates established by the Company, at its sole discretion. Proposed rate categories shall be changed no more frequently than calendar quarters, with thirty days prior notice to all affected SC 12 Rate 1 customers. The Company shall establish at its sole discretion, a single rate or multiple rate levels applicable to each category, effective on the first calendar day of each month. The Company may increase or decrease the rate level(s), at its sole discretion, at any time during the month upon notice to the Customer given in accordance with the Operating Procedures.²⁵

In addition, another provision effective May 1, 1996, said that the monthly interruptible rate statements filed with the

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interruptible service, referred to as "priorities," were identified in the tariff itself and their eligibility requirements described. See PSC No. 8-Gas, SC No. 12, Eligibility, 9th Revised Leaf No. 58 (effective Aug. 7, 1995, to May 1, 1996), and preceding effective versions of the leaf (back to March 1, 1988) giving the criteria for each priority.

²⁴ Statement No. 111 to PSC No. 8-Gas (effective May 1, 1996) included, for the first time, the eligibility requirements for each priority. That Statement includes the following printed notation: "Issued under authority of order of the Public Service Commission dated March 28, 1996 in Case No. 95-G-1055)."

²⁵ See utility appeal, p. 8, quoting PSC No. 8-Gas, 5th Revised Leaf 58-A (effective May 1, 1996). To the same effect, see subsequent versions of this provision in PSC No. 9: Leaf 331, SC No. 12, Rates, (A) Interruptible Base Rate (Rate 1), (1) Posted Rates, Leaf 331 (effective March 1, 1999, to May 1, 2002), and 1st Revised Leaf 331, effective May 1, 2002).

Commission would show "the rates and the eligibility requirements applicable to each rate category."²⁶

2. Because Con Edison exercised its authority to establish categories of base rates for interruptible customers in the monthly statements, complainants were properly charged the residential rate.

As explained above, we gave Con Edison discretion to move its eligibility requirements for the residential base rates for interruptible customers, as of May 1, 1996, into the monthly rate statements. Our next inquiry, then, concerns whether Con Edison properly exercised that discretion.

We turn to the language of the base rate statements themselves, as of May 1, 1996, and compare it to prior tariff provisions defining the base rate categories. Those categories take two forms: the priorities and, within each priority, the residential and non-residential base rates at issue in this matter. For each priority of interruptible base rates (designated AB, C, D, and E), the May 1996 statement lists the same eligibility requirements given in the tariff that had been in effect prior to May 1, 1996.

The monthly statements also retained the pre-1996 distinction between residential and non-residential rate eligibility. Prior to May 1, 1996, the tariff had stated that, "The Company shall consider the Customer's use of oil to be

²⁶ PSC No. 8-Gas, 1st Revised Leaf No. 62-A (effective May 1, 1996, to May 9, 1997). This leaf was issued "under authority of order of the Public Service Commission dated March 28, 1996, in Case No. 95-G-1055." Current tariff language is almost identical, except that now (and back at least to March 1, 1999) filing of the rate statement has to be done two, rather than three, business days prior to the effective date of the rates. See PSC No. 9, Original Leaf 346 (effective March 1, 1999).

residential only if the Customer has supplied the Company with written documentation of such residential usage for purposes of the . . . [PBT]."

In the monthly statements filed in May 1996 and thereafter, the actual base rates appeared under headings labeled "RESIDENTIAL" and "NON-RESIDENTIAL." Of primary importance here were parenthetical statements under the "RESIDENTIAL" heading which read:

also applicable to the non-residential usage of customers who are exempt from the Petroleum Business Tax.

This language plainly states that any interruptible gas usage of PBT-exempt customers was included in the residential rate category at this time.²⁷ Moreover, it confirms that the residential and non-residential base rates for interruptible service after May 1, 1996 continued, as previously, to be differentiated on the basis of whether the customer's use of its dual-fuel service was predominantly for residential purposes (i.e., providing heat to residential occupants of the customer's building) or nonresidential purposes, as opposed to whether the

²⁷ For three months, October 2001 through December 2001, the base rate statements for interruptible Rate 1 customers listed three categories related to usage: "Residential," "Non-residential (Exempt from Petroleum Business Tax)" and "Non-residential." From January 2002, through December 2002, the statements listed the two such categories: "Interruptible Base Rates (Rate 1) For Residential Use" and "Interruptible Base Rates (Rate 1) For Non-residential Use," and under the latter category the rates were listed in two sub-categories: "Non-residential" and "Non-residential (Exempt from Petroleum Business Tax)." Since January 2003, the statements have listed three such categories: "Interruptible Base Rates (Rate 1) For Residential Use," "Interruptible Base Rates (Rate 1) For Non-Residential Use," and "Interruptible Base Rates (Rate 1) For Non-Residential Use (Exempt from Petroleum Business Tax)."

actual status of the customer was residential or non-residential.²⁸

Consequently, Con Edison clearly exercised its discretion to define the residential rate category in its monthly rate statements commencing May 1, 1996. Because the record supports the conclusion that complainants had filed sales tax reduction requests with Con Edison (see pages 16-17, below) indicative of residential use entitling them to PBT exemption, and assignment to the residential rate was at all times applicable based upon the certification showing residential usage entitling a customer to the PBT exemption,²⁹ complainants were properly billed at the residential rate.

Other aspects of the utility's gas tariff confirm that "residential," as used in the base rate statements from May 1996 on, refers to residential use of service. Con Edison's firm service Residential and Religious Heating Service (SC No. 3) is applicable to "[a]ll residential uses and purposes where gas is used for space heating." For a customer to qualify for SC

²⁸ In practice, the likelihood of an actual "residential customer" (as the term is defined in our regulations, 16 NYCRR §11.2[a][2], and in the utility's tariff provision deriving from our regulation) taking interruptible gas service is essentially nonexistent, inasmuch as residential customers normally would not take on the substantial expense of installing redundant gas and oil equipment, along with equipment required for switching between the two systems. Thus, it would be unreasonable to interpret the residential base rate for interruptible service as applicable to "residential customers" only.

²⁹ From May 1996 through September 2001, the base rate statements indicated that non-residential usage exempt from the PBT could also be a basis for billing on the residential base rate. However, complainants have never denied that 75% or 100% of each of their accounts' usage of gas or oil was for residential purposes.

No. 3, gas must be supplied directly to the customer's (or the customer's employee's) own home, or to "any multiple dwelling used predominately for residential occupancy where the gas is used for space heating of the building," provided "non-residential space does not exceed 25 per cent of the cubical content of the building."³⁰ If complainants took firm, rather than interruptible gas service, they would, thus, also take service at what is termed a residential gas rate, although they are non-residential customers.³¹

The record, as well as Con Edison's monthly filed rate statements, together indicate that the utility's criteria for distinguishing between residential and non-residential base rates for interruptible gas service remained unchanged after May 1, 1996. The utility has stated throughout that residential base rates were applied at all times based on an interruptible customer's filing of a TP-385 form certifying that at least 75% of the customer's usage of gas was for residential purposes. This state form is used both for certifying residential usage to show entitlement to exemption from the PBT (which may be on account of residential heating or certain types of non-residential usage) and entitlement to sales tax reductions on account of residential heating usage.

³⁰ PSC No. 9-Gas, SC No. 3, 3rd Revised Leaf No. 236.

³¹ The utility's rehearing petition (n. 10) explains that the state Department of Taxation and Finance, since 1978, has permitted Con Edison customers in certain service classifications, where it is anticipated that all customers will be more than 75% residential, to receive the tax deduction without requiring filing of a TP-385 form. However, interruptible customers must file the TP-385 form to obtain a sales tax reduction.

Because the monthly statements clearly applied the residential rate to PBT-exempt customers for their residential usage, meaning usage for the benefit of occupants of residential apartments, complainants were properly charged the residential rate at all times.

3. Additional factors indicate that complainants were billed at the correct rate.

Moreover, annual brochures sent to all Con Edison's non-residential customers (as required by 16 NYCRR §13.12[a]) in years before and after March 2000 (when the residential base rate became more expensive than the non-residential) included a statement that the filing of a TP-385 form requesting a sales tax reduction on grounds of residential use might result in an interruptible customer's placement on a residential base rate.³² The brochures both confirm that the utility's basis for placing interruptible customers on the residential base rates did not change after May 1, 1996, and provided some notice to complainants that the eligibility requirements for the residential interruptible base rates had not changed.

Finally, complainants' 11 accounts were all placed on the residential base rate when they applied for interruptible service. The utility states on rehearing that copies of the TP-385 forms submitted to Staff prior to the informal review show that eight complainants attested to predominantly residential use of service (75% or greater) at nine of the buildings the

³² See copies of pages from the annual brochures sent to all non-residential customers in 1998, 1999, 2001, 2002 and 2003, submitted with the utility's rehearing petition. The utility also submitted a special brochure sent to all non-residential customers in September 1994 on possible eligibility for lower sales tax, which also indicated that requesting a sales tax reduction on this basis could result in placement on residential rates in the case of interruptible gas customers.

complaint concerns. It says that for two accounts the utility could not produce a copy of the form. Complainants do not deny that all accounts (including those for which the utility did not submit the TP-385 forms) are for residential apartment buildings, nor do they deny that the accounts received the sales tax reduction. No complainant has ever requested cessation of the tax reduction. Complainants benefited from billing at the residential base rates prior to January 2000, when those rates became less beneficial. Under these circumstances, the utility's inability many years later to produce the forms for two accounts is an insufficient basis for concluding that such forms were not originally filed by complainants for these accounts or that complainants have been improperly billed on residential base rates for interruptible service.

In summary, (i) between May 1, 1996 and January 1, 2003, pursuant to Commission authorization, Con Edison's eligibility requirements for the residential interruptible gas rate category were included in its monthly base rate statements instead of its tariff; (ii) the utility indicated in its rate statements from May 1996 on, that its "residential" rate applied to customers making residential use of dual-fuel service, such as complainants; (iii) the utility retained the same method of determining eligibility that had been in effect under the tariff before May 1, 1996, and provided notice in brochures sent to all of its non-residential customers in 1998, 1999, 2000, 2001, 2002, and 2003, of that method, and (iv) effective January 1, 2003,³³ the utility restored to the tariff a statement indicating its eligibility requirements for the residential base rate for interruptible base rates. For these reasons, we conclude that

³³ See pp. 3-4, above.

complainants are not entitled to rebilling at applicable non-residential base rates for any period.

However, the review conducted in this case indicates that there is insufficient basis for continued deviation with respect to the interruptible base rates from the general principle that rates (including different categories of a given rate) should indeed be identified,³⁴ and their eligibility requirements stated in tariff provisions that are approved by the Commission. Therefore, we will commence a proceeding, through an Order issued concurrently in Case 11-G-0054, to consider requiring Con Edison to amend its tariff accordingly.

CONCLUSION

For the foregoing reasons, rehearing is granted, the original determination is modified, and the requirement that complainants' accounts be rebilled and refunds made to them is reversed.

³⁴ Neither our determination nor the related order affects the use of rate statements (with respect to interruptible service or any other utility service) to give actual current prices for particular rates or categories of rates.