

Utility Rate Analysis Consultants (URAC)

156 Scranton Avenue
Lynbrook, NY 11563

(516) 536-4545 fax (516) 594-9413
email: DDiCeglio@UracCorp.com

December 24, 2010

By Electronic Mail

Ms. Jaclyn Brillling, Secretary
State of New York
Department of Public Service
3 Empire State Plaza
Albany, NY 12223

Re: Response to Petition for Rehearing in the matter of:
Ciampa et al., v. Consolidated Edison Company
PSC Case 03-G-0743, November 22, 2010

Dear Secretary Brillling:

Please be advised that complainants respond herein to Consolidated Edison Company of New York's (Con Edison or utility) request for rehearing in the above referenced matter.

A complete review of Con Edison's request will reveal that it does not meet the requirements for rehearing as it failed to document any error of fact or law and therefore should be dismissed.

RECONSIDERATION IS WITHOUT MERIT

Con Edison is taking the opportunity in its petition to resubmit its position regarding all the reasons why it believes complainants should not receive a refund. Each and every one of those reasons and facts were addressed in the Determination and were rejected by the Commission. Con Edison has not submitted any new facts nor has it provided proof that there was a mistake in the existing facts. It merely would like the Commission to come to a different result.

**THE DETERMINATION PROPERLY PLACES THE BLAME ON CON EDISON FOR
ERRONEOUSLY CLASSIFYING THE ACCOUNTS AS RESIDENTIAL**

Con Edison's petition for rehearing makes many comments and refers to many cases regarding optional rates and consumer choices. However, in this case, Con Edison, not the complainants, chose the higher residential rate because it erroneously and unilaterally decided that a form used for sales tax purposes (TP-385) can be used to classify complainants accounts on the residential rate of Service Classification 12. As the Determination properly found Con Edison had no authority, by tariff, to take such action. It stated:

..in order to require a customer to receive service at a more expensive residential (as opposed to nonresidential) base rate under SC No. 12, the utility had to establish in its tariff proper terms and conditions for distinguishing between the two base rates.
(Determination p. 10)

The Commission supported this statement by referring to a prior Determination (Everything for Living Space¹) and it is further supported by the PSC's Determination in case 07-G-0789, Sayville Schools v. Keyspan Energy, issued October 18, 2010, wherein it confirmed on page 8:

When a utility's guidelines are inconsistent with its tariff, then the tariff must prevail. In holding that a particular guideline was not consistent with a utility's tariff, the Commission has said:

Such informational bulletins are intended to provide guidance to utility staff in applying the utility's regulations. However, such guidance must be read together with the language of the tariff, which, unlike a bulletin, has the force of law.

In short, and as the Determination properly found, nothing in the tariff allowed Con Edison to define and bill complainants at the residential rate under Service Classification 12.

¹ Determination p.11

**CON EDISON'S REQUEST FOR MODIFICATIONS SHOULD BE DENIED AND THE
REFUND PERIOD SHOULD BE EXTENDED**

Con Edison makes three requests for modifications of the Determination. For the reasons explained below, these requests should be denied.²

1. Refund period should not be reduced by one (1) year but should be extended

On page 18 of its position paper Con Edison attempts to reduce the refund period by alleging that P.S.C. 9 - Gas, General Information, VIII, Second Revised Leaf No. 169, effective January 1, 2002, addressed the definition of residential and non-residential as it applies to the "rate component" of Service Classification 12. With regard to this issue the Determination of the Commission relied on Fourth Revised Leaf No. 169, effective January 1, 2003 to direct refunds from March 2000 to December 31, 2002. However, a closer review of these tariff provisions now reveals that neither implemented or addressed the proper definition of residential v. non-residential as it applies to the rate component of Service Classification 12. The provisions as originally stated (Second Revised 169), and as updated (Fourth Revised 169), are for the component of taxes that are applied to consumers bills.

Con Edison admitted to this fact in its letter of transmittal dated December 19, 2002 (Exhibit A) when it offered Fourth Revised Leaf 169 to the Commission for approval. It stated:

Also, in the tariff provision on Leaf No. 169 pertaining to the application of GRT to residential and non-residential service, changes have been made to clarify that this provision applies to firm customers taking service under SC Nos. 1,2,3,9 and 13, and to off-peak firm customers taking service under SC Nos. 9 and 12. A new sentence has been added to further clarify the application of GRT on the residential and non-residential use of interruptible customers. Currently, the monthly Statements of Rate for SC Nos. 9 and 12 list separate rates applicable to the

² One of the requests actually should result in an increase of the period required to be re-billed.

residential and nonresidential use of interruptible customers. Since such rates are prorated based on a Customer's percentage of residential use, the appropriate residential and non-residential GRT rates will be applied to the corresponding residential and non-residential rates and charges. (emphasis added)

Nothing within the letter of transmittal or the tariff provisions associated with this filing addressed the manner in which a consumer can elect to be residential or non-residential for the rate component part of Service Classification 12.

To date we can find nothing in Con Edison's tariff that defines residential as opposed to non-residential as it applies to the rate component of Service Classification 12. As such we request that the Commission modify its Determination and direct rebilling from March 2000 to current and that Con Edison be ordered to incorporate the definitions into its current effective tariff.

2. PSL 118 (3) does not apply

Con Edison's request to apply PSL 118 (3) is completely without merit. This law is not applicable to a non-residential account.

3. The Proper Rate of Interest and Period

Con Edison argues, under rehearing, that the application of interest "would be particularly onerous in this case, since the Commission's consideration of the May Informal Determination took more than seven years to be issued." (Rehearing request, p.21). This argument is barred by the doctrine of administrative collateral estoppel. In the proceedings that resulted in the interest regulations, the Commission "adopted the recommendations contained in a staff memorandum dated March 6, 1984 and a Resolution amending 16 NYCRR by addition of Parts 145 and 277 concerning the payment of interest on overcharges by electric and gas utilities" (PSC Case 28570, Issued April

Submitted as Exhibit B is a copy of page 21 of Staff's recommendation. As noted, LILCO challenged the time frame for applying interest. Staff concluded that "In regard to LILCO's concern, we believe that if a refund is owed to a customer, he is entitled to interest for the entire period the company had the use of the customer's funds unless the amount were refunded within the threshold time frame. This would be true even if the time period were extended because the customer chose to avail himself of all his rights of appeal." In a footnote related to this statement Staff noted "The utility may limit its exposure to additional interest payments by refunding the disputed amount, subject to later resolution of the complaint."

Con Edison was a party to that case and as such is now barred from attempting to re-litigate the issue through this billing dispute. "Principles of this estoppel doctrine apply when agency is acting in a judicial capacity and resolve disputed issue of fact properly before it which parties have had adequate opportunity to litigate; threshold inquiry is whether earlier proceeding is essential equivalent of judicial proceeding. (City Wide Learning Center, Inc. v. William C. Smith & Co., Inc., D.C.App A.2d 1310, 1313)

Con Edison is also attempting, through this request for reconsideration, to change the interest regulations thereby lowering the amount due. It contends that it was not at fault and that even if the Commission confirms its Determination "the rate of such interest should be no greater than the Other Customer Provided Capital Rate." (Rehearing request, p.22) The Commission has already determined that Con Edison was at fault for failing to incorporate a tariff provision identifying which accounts would be considered residential and which would be considered non-residential for the rate component of Service Classification 12. While Con Edison does not want to accept this fact, it was at fault and 16 NYCRR 277 does not provide for a rate of interest other than the late payment rate of

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1.5% compounded monthly. This is the rate complainants were subject too under Service Classification 12 during the disputed period. Again the doctrine of administrative collateral estoppel comes into play. Con Edison can not attempt to re-write the interest regulations through this billing complaint.

SUMMATION

Con Edison has failed to prove that there were any errors of fact or law. They have not provided the legal basis for a reconsideration of the November 22, 2010 Determination. With the exception of extending the refund period as explained above and directing Con Edison to incorporate a provision into its tariff dealing with this issue, the petition should be denied and the Determination should be affirmed in its entirety.

Sincerely,

Douglas DiCeglio

Douglas DiCeglio
President

DDC:wp
Enc.

C: Sara Schoenwetter (via electronic mail)
Nancy Lee (via electronic mail)

EXHIBIT A

..DID: 21211
..TXT:

December 19, 2002

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
4 Irving Place
New York, NY 10003

Hon. Janet Deixler
Secretary
State of New York
Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Case 00-M-1556 - In the Matter of the Proposed Accounting
and Ratemaking for the Tax Law Changes Included in the 2000
- 2001 New York State Budget

Dear Secretary Deixler:

By letter dated November 27, 2002, ("November 27th Filing") Consolidated Edison Company of New York, Inc. ("Con Edison" or "the Company") filed proposed changes to its Schedule for Gas Service, P.S.C. No. 9 - Gas, in compliance with the Public Service Commission's "Order Implementing Tax Law Changes On A Permanent Basis" issued June 28, 2001 in the above-referenced proceeding. These changes implemented, among other things, separate gross receipts tax ("GRT") rates applicable to the commodity and delivery rates and charges of residential and non-residential sales and transportation customers.

In this filing, the Company is proposing minor changes to the Company's November 27th Filing to clarify the application of GRT to security deposits, late payment charges, and to the non-residential and residential use of its customers.

The changes to the Company's Schedule for Gas Service are set forth in the following revised tariff leaves issued December 19, 2002, to become effective January 1, 2003:

Leaf No. 167.1 - Revision 1
Superseding Revision 0

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Leaf 169 - Revision 3
Superseding Revision 2

Summary of Tariff Changes

In its November 27th Filing, the Company inadvertently included late payment charges and security deposits as delivery charges to which GRT is applied. Since GRT is not currently applied on late payment charges or security deposits, the tariff provision on Leaf No. 167.1 has been amended accordingly.

Also, in the tariff provision on Leaf No. 169 pertaining to the application of GRT to residential and non-residential service, changes have been made to clarify that this provision applies to firm customers taking service under SC Nos. 1,2,3,9 and 13, and to off-peak firm customers taking service under SC Nos. 9 and 12. A new sentence has been added to further clarify the application of GRT on the residential and non-residential use of interruptible customers. Currently, the monthly Statements of Rate for SC Nos. 9 and 12 list separate rates applicable to the residential and non-residential use of interruptible customers. Since such rates are prorated based on a Customer's percentage of residential use, the appropriate residential and non-residential GRT rates will be applied to the corresponding residential and non-residential rates and charges.

Waiver of Newspaper Publication

Since there are no material tariff changes being made in this filing, the Company respectfully requests that further newspaper publication of the changes proposed herein be waived. The Company has commenced newspaper publication of its November 27th Filing and will file proof of same pursuant to 16 NYCRR § 720-8.1(a) as soon as such publication is completed. Copies of this filing are also being sent to gas marketers serving transportation customers in the Company's service area.

Sincerely,

Received: 12/19/2002

Joel H. Charkow
Director
Rate Engineering Department

EXHIBIT B

PULP's suggestion that interest be applied to refunds made after the effective date of the rules appears reasonable. Therefore the word "overcharges" in the first sentence of this section should be replaced with the word "refunds" so that the pertinent part reads "...[no utility] shall be required to pay interest on any customer [overcharges] refunds that occurred before the effective date of these rules."

2. Threshold Time Frame

The utilities generally agree with the proposed time threshold -- overcharges refunded within two months would be exempt from the interest requirement. Brooklyn Union urges that the two months be measured from the date of the customer's first inquiry on the problem or the utility's identification of the matter. Orange and Rockland supports the two month time frame and believes the administrative burdens would be substantially altered if this initial exemption period were not established. LILCO is concerned about cases where a refund is rejected by the customer and as a result, the final acceptance of the refund extends beyond two months.

In regard to LILCO's concern, we believe that if a refund is owed to a customer, he is entitled to interest for the entire period the company had the use of the customer's funds unless the amount were refunded within the threshold time frame. This would be true even if the time period were extended because the customer chose to avail himself of all his rights of appeal.^{1/}

^{1/} The utility may limit its exposure to additional interest payments by refunding the disputed amount, subject to later resolution of the complaint.