STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on August 18, 2011

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
James L. Larocca

CASE 08-E-0836 – Petition of Frawley Plaza, LLC to submeter electricity at 1295 Fifth Avenue, 1309 Fifth Avenue and 1660 Madison Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., filed in C 26998.

CASE 08-E-0837 – Petition of Metro North Owners, LLC, to submeter electricity at 1940-1966 First Avenue and 420 102nd Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., filed in C 26998.

CASE 08-E-0839 – Petition of KNW Apartments, LLC, to submeter electricity at 1890 Lexington Avenue and 1990 Lexington Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., filed in C 26998.

ORDER REINSTATING SUBMETERING
APPROVAL WITH CONDITIONS

(Issued and Effective August 24, 2011)

BY THE COMMISSION:

INTRODUCTION

In an order issued September 17, 2009 (2009 Rehearing Order), the Commission reopened determinations that had granted the submetering petitions of four apartment complexes in New

York City.[1] The four complexes are owned by four different entities, i.e. Frawley Plaza, LLC; Metro North, LLC; North Town Roosevelt LLC; and KNW Apartments, LLC. These four entities are owned by Urban American (collectively and hereafter referred to as Petitioner or Landlord). The apartments in each of these four apartment complexes are electrically-heated and a significant portion of each provides housing to low income tenants. In the 2009 Rehearing Order, we granted, in part, petitions for rehearing filed by elected officials whose constituents include the tenants of these apartment complexes, and the majority of which tenants receive income-based Section 8 Enhanced Voucher housing subsidies.[2]

The 2009 Rehearing Order stayed submetering at all four complexes. We also required Petitioner to submit new submetering plans that would implement specific Commission requirements before submetering could begin. We directed that

[1] See Cases 08-E-0836, 08-E-0837, 08-E-0838, and 08-E-0839 -- Petitions to Submeter Electricity, Order Denying In Part And Granting In Part Petitions For Rehearing And Establishing Further Requirements (issued and effective September 17, 2009)(2009 Rehearing Order); see also Case 08-E-0836, Untitled Order (issued and effective November 21, 2008) and Cases 08-E-0837, 08-E-0838, and 08-E-0839 Untitled Orders (issued and effective November 28, 2008)("2008 Roosevelt Submetering Approvals").

[2] Prior to our 2009 Rehearing Order, submetering equipment had been installed in most apartments in each of these apartment complexes and Landlord had used the equipment to calculate shadow bills for each tenant. A shadow bill measures the electricity use for each apartment and calculates a bill reflecting such usage. The shadow bill may be provided for informational purposes to the tenant, but actual submetering is not occurring and the tenant has no responsibility to pay the amount shown on the shadow bill.

these revised submetering plans be developed in consultation with tenants and other interested parties.

Subsequent to the 2009 Rehearing Order, a submetering Order in a similar, but not identical, case was also challenged by a Petition for Reconsideration. The case concerned submetering at 47 Riverdale Avenue in Yonkers, New York (Riverview II) and resulted in a February 18, 2010 Order on Reconsideration, the 2010 Riverview II Order.[3] Like the Petitioner's buildings, Riverview II is an electrically-heated apartment building housing many low income tenants. The 2010 Riverview II Order provided further clarification of a submeterer's responsibilities in multi-family dwellings heated with electric baseboard units and housing low income tenants and adopted notice conditions that must be met prior to billing end-users for submetered electricity; we also spelled out the components of our Financial Harm Test;[4] and, in the circumstances of the Riverview II building, we reconsidered our position that treating electric charges as rent would be prohibited.

On October 21, 2010, Petitioner filed revised submetering plans for each of the four complexes, which it believes satisfy the 2009 Rehearing Order's requirements and are

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[3] Case 08-E-0439 - Petition of Riverview II Preservation, LP to Submeter Electricity at 47 Riverdale Ave., Order on Reconsideration (issued and effective February 18, 2010) (2010 Riverview II Order).

[4] The 2010 Riverview II Order describes the Financial Harm Test as follows: "If the [Section 8] utility allowance is equal to or greater than the tenant's electric charges, then the tenant suffers no financial harm from the transition to submetering. If this is true for more than half the tenants, then tenants as a group are unharmed." 2010 Riverview II Order 19. Previously, in our 2009 Rehearing Order, we specified that this test is applicable to tenants as a group, and to Section 8 tenants as a group.

consistent with our determinations in the Riverview II matter. Petitioner requests that the revised submetering plans be approved; that the stay of the submetering approvals be lifted; and that Cases 08-E-0836, 08-E-0837, 08-E-0838, and 08-E-0839 be closed. Petitioner's revised submetering plans include the results of a Financial Harm Test for each building and a commitment that all tenants will receive a utility allowance in the form of a rent reduction in consideration for the utilities that will no longer be included in their monthly rent. Further, Petitioner, prior to submetering, commits to: complete all items in its approved scopes of work related to the New York State Energy Research and Development Authority's (NYSERDA) Multifamily Performance Program (MPP); install a programmable thermostat in each tenant's apartment; replace any refrigerator that was manufactured prior to 2001 with an EnergyStar® rated refrigerator; and provide education and outreach to tenants to help reduce their energy use and electricity costs, including written materials, internet-based tools, group workshops, one-on-one consultations, and energy assessments for the highest energy users. Petitioner also agrees to register as a Home Energy Assistance Program (HEAP) vendor to facilitate the receipt of benefits on behalf of eligible tenants.

For the reasons set forth below and with the conditions set forth herein, we will remove the stay of submetering, created by the 2009 Rehearing Order at the three apartment complexes that are the subject of this order, Frawley Plaza, Metro North, and KNW Apartments.[5]

[5] The stay of submetering for the fourth complex, North Town Roosevelt, and the revised submetering plan for that complex are not addressed by this order.

Procedural Background

On July 16, 2008, Petitioner submitted four petitions to submeter at the four apartment complexes in New York City which are the subject of this proceeding (Frawley Plaza, Metro North, North Town Roosevelt, and KNW Apartments). While those petitions informed the Commission that a large portion of residents received governmental assistance in the form of rent and utility assistance, they did not inform the Commission that the apartments in each of these complexes were heated with electric baseboard units nor that the ability to improve the energy efficiency of these apartments by better insulation or other means was limited.

Tenants complained to the Commission in September, 2008, that Petitioner had begun installing submeters prior to having received approval to submeter. In response to these complaints, Petitioner confirmed the submetering installations but assured the Commission that tenants would not be billed for submetered service until submetering had been approved.

On November 12, 2008 and November 21, 2008, the Commission issued orders approving the submetering petitions at all four complexes. In these 2008 Submetering Approvals, the Commission explicitly recognized the applicability of the Home Energy Fair Practices Act (HEFPA) to Petitioner's provision of submetered electric service and to the protections and procedural remedies that must be provided to tenants receiving submetered electric service by the Petitioner under HEFPA. At the same time, the approval of these submetering petitions also allowed Petitioner to include in the leases for apartments in these complexes provisions which would characterize charges to

the tenant for submetered electric service as "rent".[6] Three months after the approval of these petitions, on February 10, 2009, tenants sought a stay or rescission of the submetering approvals, which we granted on a temporary basis on February 12, 2009. After receiving numerous comments, on May 12, 2009, the Commission extended its emergency stay for 60 days; it did so again on July 10, 2009 and September 3, 2009 to allow DPS Staff to investigate the rehearing petitions.

On September 17, 2009, the Commission stayed the submetering petitions permanently until Petitioner submitted submetering plans that demonstrated that (1) tenants, as a group, and, in particular, low income tenants as a group, would not be disadvantaged financially as a result of submetering (the Financial Harm Test); (2) individual thermostats had been installed in all apartments; (3) Petitioner had participated in and completed its Energy Reduction Plans (ERP) under NYSERDA's MPP aimed at improving energy efficiency at the premises; (4) programs had been developed to provide tenants with information concerning opportunities to reduce their electricity usage; (5) written materials had been made available to tenants explaining customer rights under the HEFPA; and (6) leases treating electric charges as "rent" would no longer be used to evict tenants. We directed that Petitioner develop the revised submetering plans in consultation with tenants and other interested parties.

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[6] By characterizing submetered electric charges as "rent", the Landlord may be able to bring an action in landlord/tenant court based on these unpaid charges and to seek in that action to terminate the tenant's lease and his or her tenancy. In the 2008 approval of these petitions, the Commission offered no opinion as to the viability of such an action or the availability of such a remedy in the event such action was brought.

In its October 21, 2010 petition submitting revised submetering plans, Petitioner seeks permanent submetering approval at the four complexes. Petitioner included with its revised submetering plans data showing individual apartment electric usage,[7] an account of its consultation with tenants, and a plan for installing thermostats, completing its ERPs, and implementing energy efficiency education and HEFPA programs before any submetering begins. In addition, Petitioner will become a HEAP vendor and replace refrigerators older than 2001 with EnergyStar® rated models.

Petitioner's October 21, 2010 petition was published in the New York State Register on November 17, 2010.[8] Comments were received from nine state and federal elected officials, including Assemblyman Micah Kellner (Assemblyman Kellner) on December 23, 2010 and from the Coalition of Urban American Tenant Associations (CUATA or Tenants) on January 3, 2011. During the initial comment period, at least 130 individual tenants filed public comments with the Secretary.

By Notices issued January 13, 2011 and January 18, 2011, the Secretary ultimately extended the comment period to February 15, 2011. In all, more than 350 tenants commented on Petitioner's revised submetering plans. CUATA also submitted a "Thermal Imaging Report" that purports to show how energy inefficient the buildings in the four apartment complexes are. On February 18, 2011, Petitioner responded to the Assemblyman

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[7] After the 2009 Rehearing Order, Petitioner collected one full year of shadow billing information for each apartment in which a submeter had been installed.

[8] To correct a detail missing from the original SAPA Notice, a second SAPA Notice for Frawley Plaza was published on December 8, 2010.

Kellner and CUATA comments and, more generally, to individual tenants' complaints, as well as to the Thermal Imaging Report.

Individuals who commented expressed concern primarily about the high cost of heat in poorly insulated apartments, where, for instance, gaps under front doors to hallways are common. Some claimed that, because of mistakes in wiring, they *would be paying for electricity used in common areas in addition* to the electricity in their own apartment. Others stated that common areas are overheated; some said they are drafty. Disabled, senior, and fixed income tenants opposed submetering for fear they will not be able to afford a separate electric bill, fear of eviction if they are not able to pay their bill, and generally explain that rising costs are a problem. Finally, tenants asked for more information on the Financial Harm Test, the results of which Petitioner shared with tenants, but the individual resident details of which, due to privacy protections, were not shared. The numerous public comments are well reflected in the Assemblyman Kellner and CUATA comments, which are addressed in the discussion that follows.

Petitioner's Plans and the Consultation Process

In the 2009 Rehearing Order, Petitioner was directed to file new and more comprehensive submetering plans developed in consultation with affected parties and which comply with the requirements set forth in that Order. On October 21, 2010, Petitioner filed revised submetering plans that, it states, comply with the 2009 Rehearing Order and subsequent Riverview II orders.

In Exhibit A, attached to its petitions, Petitioner details the consultative process that it used to develop the submetering plans for which it seeks approval. For instance, Petitioner met with CUATA (formerly the Putnam Tenant Coalition)

and with elected officials on six occasions and communicated with them in writing on five more occasions. The Exhibit includes e-mail correspondence, written answers to two sets of extensive tenant questions, and Landlord newsletters summarizing planned energy efficiency, thermostat installations, and the petition process.

In their December 23, 2010 (Assemblyman Kellner) and January 3, 2011 (CUATA) comments, however, the tenants and Assemblyman Kellner claim that only two meetings with elected officials took place and the meetings were "one-sided."[9] Tenants complain that the meetings created expectations which could not be met. Specifically, the tenants said their questions were not answered at meetings and the detailed plan tenants and Assemblyman Kellner offered for how Petitioner should address the special electric heating costs of seniors and tenants with disabilities was ignored. Instead, it is asserted that Petitioner pressed forward without including "any suggestions at all" from tenants.[10] Assemblyman Kellner believes, therefore, that the meetings with elected officials and tenants "failed substantively to comply" with the 2009 Rehearing Order,[11] because Petitioner did not incorporate "numerous important suggestions" from tenants and elected officials into their submetering plans.[12] Assemblyman Kellner also claims Petitioners should have disclosed the "data purporting to minimize the financial impact" even though it was a confidential exhibit to the October 21

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[9] Assemblyman Kellner 3; CUATA 4.

[10] Assemblyman Kellner 5.

[11] Assemblyman Kellner 2.

[12] Assemblyman Kellner 5.

submetering plans. Since he was "forced to submit an interrogatory to obtain the information," Assemblyman Kellner complains that he cannot share the information with tenants because it is subject to a protective order.[13]

We conclude that Petitioner adequately complied with the Commission's directive to include affected parties in developing its submetering plans. Despite Assemblyman Kellner's and CUATA's claims that Petitioners failed to adequately consult or listen to tenants, the record shows that at least six meetings were held with tenants and their advocates. It may be that specific questions and answers were not exchanged at these meetings, but many sets of IRs and questions from Assemblyman Kellner and tenants were answered in writing (on November 4, 2009, July 19, 2010, September 16, 2010, October 8, 2010, October 14, 2010, and February 22, 2011) and numerous e-mail exchanges were shared, as shown in Petitioner's Exhibit A. Moreover, Petitioner took responsive action. Most notably, in response to tenant requests that older, more inefficient refrigerators be replaced on an accelerated timetable, Petitioner reports that all refrigerators more than 10 years old are being replaced with Energy Star® models.[14] Moreover, Petitioner has committed to providing monthly updates describing building and energy efficiency improvements.[15] Therefore, Assemblyman Kellner is mistaken in claiming that Petitioner "failed to incorporate suggestions from tenants and others . . .

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[13] Id.

[14] Petition 2.

[15] Petition Exhibit A, January 15, 2010 letter to Manhattan Borough President Stringer. We will include in this order the requirement that these measures be completed before submetering begins.

in their revised submetering plans."[16] The record shows Petitioner was responsive to tenants and elected officials as required by the 2009 Rehearing Order and that it responded reasonably as part of that consultative process. The lists of questions Assemblyman Kellner claims Petitioner has not answered in its petition are in fact answered in the October 21 filing, were never required in our 2009 Rehearing or Riverview II Orders, or were, in verifying tenant usage data, independently confirmed through DPS Staff analysis as part of our deliberative process.

Finally, Petitioner's decision not to disclose actual tenant usage, which are confidential data, was reasonable. Use of the confidential data needed to determine if our Financial Harm Test has been met required that any party seeking such information submit an interrogatory request to receive it. That data remains under Protective Order, as it must, to protect private, individual end-user information. Petitioner acted reasonably in restricting and protecting access to individual tenant data by keeping such information confidential and sharing it only in a manner that protects tenant privacy.

Financial Harm Test

In the 2009 Rehearing Order, we directed that the Petitioner, because each apartment complex is electrically-heated and serves tenants receiving income-based housing assistance, must demonstrate to the Commission that the financial impact of submetering will benefit more tenants than not. In the 2010 Riverview II Order we provided in detail how the test should be calculated. For Petitioner, the test included the requirement that "Tenants, as a group, and, in

[16] 2009 Rehearing Order 25.

particular, the Section 8 Enhanced Voucher tenants, as a group, are not disadvantaged financially as a result of submetering."[17] Using government-determined Section 8 "utility allowances" as a baseline, the test is: "If the utility allowance is equal to or greater than the tenant's electric charges, then the tenant suffers no financial harm from the transition to submetering. If this is true for more than half the tenants, then tenants as a group are unharmed."[18]

The methodology requires that landlords collect one full year of shadow electric bills showing actual usage for each occupied apartment. Further, under the parameters adopted in the 2010 Riverview II Order, landlords may take into account (1) an expected 10% reduction in monthly electric charges due to conservation expected once tenants begin paying for their usage;[19] (2) a reasonable monthly service charge; and (3) the use of an estimated Home Energy Assistance Program (HEAP)[20] participation rate that would be achievable after the implementation by the landlord of an aggressive HEAP

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[17] 2009 Rehearing Order 25.

[18] Petitioner's practice of using the amount of utility allowances to comply with the Commission's current submetering rules for market rate tenants and which require that rent be reduced by the amount of the new electric charges due to submetering is acceptable. Petitioner October 21 Filing at 5; see 16 NYCRR §96.2.

[19] We allowed for the likelihood of a 10% reduction in usage with the concomitant requirement of (1) installation of thermostats and (2) aggressive, tenant-focused, individualized, energy efficiency campaigns.

[20] HEAP is a federally funded program that issues heating benefits to meet a portion of a household's annual energy cost.

participation campaign, in conformance with that which is described in detail in the 2010 Riverview II Order.[21]

To show that they meet this Financial Harm Test, Petitioner included in its filing shadow bills from between April 1, 2009 and March 31, 2010 for all submetered apartments.[22] It then adjusted these bills by the 10% reduction in usage expected when tenants receive accurate price signals, which submetering provides. Petitioner found, that among Section 8 tenants, 77.55% (Frawley Plaza), 64.86% (Metro North), and 73.41% (KNW Apartments) will benefit financially from submetering. Considering all tenants as a group, the Petitioner's analysis shows that 80.18% (Frawley Plaza), 70.49% (Metro North), and 77.02% (KNW Apartments) will benefit.[23] Thus, at Frawley Plaza, Metro North and KNW Apartments, the number of tenants benefitting from submetering far exceed those who are harmed.

Tenants and Assemblyman Kellner are not convinced. They criticize the structure of our Financial Harm Test, noting that, consistent with many of the individual comments, the apartment complexes at issue are poorly insulated and that, despite the average number of tenants experiencing "no harm"

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[21] 2010 Riverview Order 21-23.

[22] Petitioner October 21 Filing 6. In its April 11, 2011 response to DPS-1, LSC-1, Petitioner states that 98% of submeters have been installed and that further installation ceased on February 12, 2009 when the Commission stayed Petitioner's prior submetering approval.

[23] Finally, among tenants paying market rate rents, 85.96% (Frawley Plaza), 81.49% (Metro North), and 83.33% (KNW Apartments) will benefit financially with submetering. See Petitioner October 21 Filing 6.

with submeters, hundreds of individual tenants will still be impacted with higher electric bills.[24] Moreover, Assemblyman Kellner argues that the Landlord failed to use "a full year financial harm forecast" (emphasis added), which Assemblyman Kellner states was required by the 2009 Rehearing Order. Assemblyman Kellner criticizes the financial harm data provided by Petitioners as "flawed" in that it does not take into account the recent Con Edison rate increase, higher anticipated heating costs, and the individual impact on members of vulnerable populations.[25]

CUATA asks that the "averages" of tenant benefits more fully be made public and that the gap between utility allowances and charges, as well as the "total dollars not covered by DHCR allowances," be specified. CUATA believes that the total financial "benefits" to tenants and a comparison of benefit to harm overall for tenants should be assessed in determining submetering's impact.[26] Moreover, CUATA seeks to use a future estimate of charges rather than the actual shadow bills from the last year to determine the financial impact on tenants. Assemblyman Kellner further states that Petitioner has "made no mention" of whether Petitioner will charge an administrative fee or not.[27]

CUATA agrees with the elected officials in claiming that the new Con Edison delivery rates, effective April 2011, should be reflected in any calculation of financial harm. They

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[24] CUATA 1-2.

[25] Assemblyman Kellner 2.

[26] Assemblyman Kellner 6, 8.

[27] Id., fn. 12.

submit a "new" Exhibit C, which takes into account the new Con Edison rates.[28] Once these new rates are taken into account, Assemblyman Kellner states, 49.05%% of tenants overall pass the Financial Harm Test.[29] Relatedly, with the failure to reflect that 2009 and 2010 temperatures were "lower than normal," Assemblyman Kellner claims the Financial Harm Test does not reflect "known normal weather patterns."[30]

Finally, Assemblyman Kellner states that the Financial Harm Test is too simplistic in that it fails to account for higher heating costs associated with senior and disabled residents who remain homebound during the day. The comparison of homebound tenants' heating bills to those of able-bodied tenants who work during the day is a mismatch requiring a "more refined assessment of impacts . . . including household composition."[31] We address each of these concerns separately, below.

Based upon our review of the shadow billing data provided, we find that Petitioners meet the Financial Harm Test for Frawley Plaza, Metro North and KNW Apartments.

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[28] Assemblyman Kellner 7. As with all customers, commodity rates are not affected by the Con Edison rate increase as they are subject to market forces.

[29] Assemblyman Kellner 8.

[30] Assemblyman Kellner 9. Assemblyman Kellner does not, however, elaborate nor provide the "full forecast" that does adjust for changing weather conditions.

[31] Assemblyman Kellner 10, fn. 25.

Use of Shadow Bills

Our 2009 Rehearing Order required that Petitioner, in its showing regarding our Financial Harm Test, use a future "forecast" of bills that reflects "projected submetering electricity usage incorporating actual energy use as measured by available shadow bills,"[32] because, at the time of that order, a full year of shadow bills showing actual usage was not yet available at the Petitioner properties. In the ensuing months, however, such information became available; Petitioner used it to estimate the financial impact of submetering on tenants; and the documentation is made part of this record. CUATA and Assemblyman Kellner nonetheless seek use of forecasted rather than this actual usage.

Our 2009 Rehearing Order required 12 months of usage information, which we described as a forecast because actual usage data might not be available. Since, however, 12 months of historical usage information is available for these apartment complexes, this historic usage data should be used because it reflects actual, rather than estimated, usage. We reached a similar conclusion in our 2010 Riverview II Order.[33] Assemblyman Kellner's and CUATA's request to use estimated bills, therefore, is denied.

CUATA and Assemblyman Kellner also seek to require a new round of shadow billing that incorporates Con Edison's most recent rate increases, to determine again if Petitioner's buildings meet the Financial Harm Test. Having rejected such a proposal in the 2010 Riverview II Order Denying Rehearing, we do so here for the same reasons. Foremost, we adopted use of a recent historical period in the 2010 Riverview II Order soon

[32] 2009 Rehearing Order 25.

[33] 2010 Riverview II Order 18.

after these same rates were put into effect. Moreover, it is the practice of governmental agencies establishing those allowances to update them periodically to reflect current costs.

Public Availability of Data

Assemblyman Kellner's complaint that apartment-level usage data was difficult to obtain is belied by the Assemblyman's own e-mails. Petitioner attached to its February 18, 2011 response an e-mail correspondence from Assemblyman Kellner's office confirming his receipt of confidential, actual apartment-level usage data. Moreover, it is paramount that the Commission protect the privacy of individual end-users even if doing so creates a burden on parties to a proceeding. Usage data developed in connection with a submetering proposal that identifies the tenant should not be shared without the tenant's consent and without a commitment from the recipient of such information to protect its confidentiality. Because of this, CUATA's complaint that it was not able to see individual apartment usage data is unreasonable. Private data is made available only when a party is able to agree to abide by and remain subject to a protective order, and this practice is the norm in all Commission proceedings. Assemblyman Kellner himself signed such an order; CUATA and other elected officials did not.[34]

[34] We note that Petitioner surmises that Assemblyman Kellner unlawfully shared protected information with elected officials who did not sign a protective order. While Assemblyman Kellner, in reviewing the confidential information may have acted on behalf of the elected officials who signed his comments, this alone does not establish that non-signing officials were privy to or reviewed the background data used to create Assemblyman Kellner's Exhibit "C," which the Assemblyman submitted under separate cover to the Commission, or that Assemblyman Kellner violated the protective order.

Regardless of public access to the relevant data, however, DPS Staff analyzed all of the data Petitioner submitted, including the confidential data. Our analysis of this data provides an accurate assessment of the expected financial impacts of submetering on residents and, therefore, of the compliance of these apartment complexes with our Financial Harm Test.

Senior and Disabled Tenant Programs

Petitioner suggests that it can improve its Financial Harm Test results by identifying senior and disabled tenants eligible for utility "surcharges" available through Section 8 programs. Petitioner did not calculate what that impact might be, stating it will identify eligible tenants once submetering is approved and as part of its HEFPA program. Petitioner should clarify in more detail the financial impact of these programs in its compliance filings. These compliance filings will be filed with the Office of the Secretary to the Commission and the Director of Consumer Policy. Active parties to these proceedings will then receive electronic notice of such filings, when made, through the Commission's Document Management and Matter Management System (DMM).

Assemblyman Kellner and CUATA's concern that Petitioners did not act on tenants' offer of assistance in developing the senior and disabled tenant programs is valid and Petitioner should attempt to cooperate with tenants in identifying senior and disabled tenants. Petitioner has committed to reaching out to seniors and disabled tenants and to working with these tenants on a case-by-case basis to ensure that their heating costs are not unduly burdensome. The presence of tenants with these characteristics in the apartment complexes, however, is not a reason to deny submetering and we

commend Petitioner's commitment that it will not "put[] any seniors at risk due to electric bills."[35]

Individual Impacts

Assemblyman Kellner claims that, although tenants overall and Section 8 tenants as a group, at a given apartment complex, may experience no financial harm from submetering, individual tenants will still be impacted with higher electric bills and this should be remedied. The Assemblyman also suggests that the Commission should analyze the financial impact of submetering on tenants enrolled in the "Landlord Assistance Program" (LAP).[36]

In response, Petitioner cites to the standard established in the 2009 Rehearing Order and claims that Assemblyman Kellner seeks to "alter" the Financial Harm Test. Petitioner claims it would be unfair to change the Test, as first set forth in the 2009 Rehearing Order and as further described in our 2010 Riverview II Order. Moreover, Petitioner claims that LAP tenants should not be included in the subset of low income tenants to which the Commission's Financial Harm Test methodology applies because the Commission limited that group to Section 8 Enhanced Voucher tenants. Petitioner argues this, too, would change the Financial Harm Test long after its development.

In seeking to require that each individual tenant benefit financially from submetering before submetering can proceed, Assemblyman Kellner not only seeks to modify the Financial Harm Test developed in the 2009 Rehearing Order and 2010 Riverview II Order; he would render that Test useless.

[35] Petitioner October 21 Filing 6-7.

[36] Assemblyman Kellner 9-10.

That is, if we prohibit submetering unless every tenant will not immediately benefit from submetering, we would deny the advantages of submetering for tenants who are already conscientious in their energy use or who may undertake energy conservation measures once submetering is in place. We would also deny benefits to electric ratepayers in general from conservation savings that will flow once submetering is implemented. We established the Financial Harm Test to identify instances in which the implementation of submetering would be inconsistent with our broader policy goals and continue to apply it here for that same purpose.

Charging Less Than the SC-1 Rate

Assemblyman Kellner suggests that Petitioner should charge the bulk Con Edison rate (the lower redistribution rate Con Edison charges for electric service to submetered properties) to tenants rather than the residential rate submeterers are authorized to charge in 16 NYCRR Part 96. Alternatively, Assemblyman Kellner and CUATA state that the Landlord should charge less to seniors and disabled tenants or provide additional subsidies.[37] Assemblyman Kellner also complains that the Landlord has not included the "method of rate calculation" nor complaint procedures in leases.[38] These issues were not directly addressed in our 2009 Rehearing Order.

Pursuant to the Commission's submetering regulations, Petitioner is entitled to charge submetered customers up to the

[37] Assemblyman Kellner 5.

[38] Assemblyman Kellner 6.

residential direct-metered rate for electric service. While the master-metered building owner is billed at the lower residential redistribution rate, that building owner is responsible for all customer care costs, including meter reading, billing, complaint handling, maintenance of the submetering system, and the costs of collections and uncollectibles. Permitting submeterers to charge up to the residential direct metered rate provides submeterers a reasonable opportunity to recover these customer care costs.

Petitioner's Energy Reduction Plans

When we issued the 2009 Rehearing Order, Petitioner had not yet completed implementation of its Energy Reduction Plans (ERP) developed as part of NYSERDA's MPP.[39] Those ERPs include installation of energy efficiency building improvements, some of which would be financed by NYSERDA grants. We directed Petitioner to provide assurance that, before billing tenants for submetered usage, the ERP would be fully implemented. In its new submetering plans, Petitioner commits to completing its ERPs before any submetering will take place.[40]

CUATA and Assemblyman Kellner maintain that Petitioner does not appear to be "firmly committed" to implementing its ERPs and that the Commission should not remove its stay of submetering until all parts of the ERP are complete. Requiring Petitioner to return to the Commission after the ERPs are complete, Assemblyman Kellner believes, will force Petitioner to comply before submetering goes into effect.

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[39] Each complex has its own Energy Reduction Plan.

[40] Petitioner October 21 Filing 1.

Consistent with our 2009 Rehearing Order, we order Petitioner to verify completion of the ERP for each complex with a certification from NYSERDA before submetering may begin. Such a report would provide adequate proof that all NYSERDA MPP ERPs have been completed.[41] Petitioner, therefore, is required to submit in compliance filings to the Office of the Secretary to the Commission and the Director of the Office of Consumer Policy, a NYSERDA completion certificate before submetering may begin at each complex. Active parties to these proceedings will then receive electronic notice of such filings, when made, through the Commission's Document Management and Matter Management System (DMM).

In a separate but related issue, Assemblyman Kellner, CUATA and many individual tenants comment that wiring in individual apartments is cross-wired with the wiring in common areas and, in Assemblyman Kellner's words, "does not properly distinguish between apartment and common area space."[42] In Exhibit A to its October 21 filing, Petitioner states that the original electrical drawings for the buildings show that common areas are cross-wired with individual apartments. In its reply comments, Petitioner submitted an affidavit from the company that installed the submeters. That affidavit states that tests were performed to ensure that cross-wiring did not occur.[43] Moreover, Petitioner suggests that tenants have at their disposal the ability to test Petitioner's claims by turning off

[41] Petitioner states that, as of February 18, 2011, 50% of its energy efficiency improvements approved under NYSERDA's MPP had been completed.

[42] Assemblyman Kellner 2.

[43] February 18, 2011 Petitioner Reply 14.

all electrical components temporarily to see if their submeters continue to read usage. Finally, if submeters continue to read electric usage after all electric items have been shut off, tenants may complain to the landlord pursuant to HEFPA.

Installation of Energy-Efficient Refrigerators

The installation of energy-efficient refrigerators was the subject of many individual tenant comments. Petitioner's submetering plans include the replacement of all refrigerators manufactured before 2001 with Energy Star® rated refrigerators. During the consultative process, tenants sought replacement of all refrigerators, regardless of age, with Energy Star® units prior to the commencement of submetering. Petitioner responded by submitting submetering plans in which all tenants whose apartments include a refrigerator manufactured before 2001 will be notified that they qualify for an Energy Star® rated refrigerator.[44] Petitioner will then provide, for apartments with such refrigerators, two opportunities for tenants to allow entry so that a replacement refrigerator can be provided.

The Landlord's commitment to replace refrigerators with Energy Star® refrigerators prior to the commencement of submetering advances the efficient use of energy and assists tenants in managing their electricity usage. Inclusion of the commitment to replace refrigerators directly addresses a primary concern expressed by tenants -- that the Landlord not be allowed to transfer all responsibility for electric charges to tenants without significant energy efficiency improvements or substantive assistance in shouldering electric costs. We

[44] Petitioner October 21 filing 9.

require Petitioner to certify, in its compliance filing before submetering may commence for Frawley Plaza, Metro North and KNW Apartments that it has satisfied this commitment. Within these parameters, this aspect of those submetering plans is accepted.

Energy Efficiency Education

Our 2009 Rehearing Order required Petitioners to provide additional information to tenants regarding reasonable action they may take to reduce their energy consumption. Petitioner maintains that it has been providing detailed energy efficiency education to tenants at these complexes since 2008.[45] The revised submetering plans include new energy efficiency education measures, consistent with additional requirements identified in our 2010 Riverview II Order. Tenant education will commence before submetering goes into effect and will include: (1) provision of written materials no later than four months prior to the commencement of submetering and again between October 1st and November 15th of the next heating season explaining, generally, energy-consumption and energy savings, along with an explanation of achievable individual energy savings at the properties; (2) availability of an energy-efficiency expert to tenants as a group at least once a month to deliver energy efficiency education in each of the four months prior to submetering and once a month in each of the two months after submetering has commenced; and (3) availability of the energy-efficiency expert to provide more personalized counseling to those tenants with historically high electric usage, defined

[45] Petitioner October 21 Filing 9.

generally as those with usage 50% above their monthly government issued utility allowance (at two months prior to submetering).[46]

Neither the tenants nor Assemblyman Kellner identify concerns about the extent of energy efficiency education that Petitioner has conducted to date. Moreover, Petitioner's energy efficiency education plan compares well with the submetering plan we approved in the 2010 Riverview II Order. Therefore, we find that Petitioner's energy efficiency education plans comply with our 2009 Rehearing Order and 2010 Riverview II Order. We require Petitioner to report in compliance filings that it has completed all of the pre-submetering energy efficiency education requirements set-forth in its plans.

Programmable Thermostats

We required that tenants be provided means to control the amount of electricity to be used for heat in their apartments through installation of thermostats.[47] Petitioner's submetering plans include the installation of programmable thermostats with accessible controls in the living room of each apartment prior to the commencement of submetering.[48] Since it is necessary to access individual apartments to install thermostats, Petitioner committed to using its "best efforts" to do so, as we required of Riverview II.[49] However, Petitioner goes further than the 2010 Riverview II Order in that, in response to a CUATA request, rather than installing thermostats

[46] Petitioner October 21 Filing 10.

[47] 2009 Rehearing Order 26.

[48] Petitioner October 21 Filing 8.

[49] 2010 Riverview II Order 16.

over up to a two-year period (as we allowed in the 2010 Riverview II Order), Petitioner will not begin submetering until it completes the thermostat installation.[50] In this way, Petitioner claims, its submetering plans are more proactive than Riverview II's. Petitioner plans to begin thermostat installations upon the Commission's submetering approval.

Tenants respond that Petitioner's thermostat installation has not been completed.[51] Assemblyman Kellner further complains that the Landlord abandoned the possible use of a new technology and thermostats that would separate charges for electricity used for heat from the charges for which the tenant would be responsible. He also complained that this technology may, if implemented, be harmful to health,[52] and would allow Petitioner to "remotely control tenants' heat settings."[53] Finally, Assemblyman Kellner argues that the Commission's intent in requiring that a thermostat be installed in "the major living area or sleeping space," in fact means that thermostats should be installed in "more than a single room," and argues that this would allow tenants "greater control" over their energy usage.[54]

As we stated in the 2009 Rehearing Order, "Given the large impact in these buildings of electric heat on tenants'

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[50] Petitioner offers to give tenants two opportunities to provide apartment access to install thermostats after which tenants would waive their right to receive a thermostat prior to the commencement of submetering. However, thereafter, Petitioner should continue to work to install thermostats when other opportunities arise to enter apartments.

[51] Assemblyman Kellner 11.

[52] CUATA 3; Assemblyman Kellner 11-12.

[53] Assemblyman Kellner 12.

[54] Assemblyman Kellner 12.

overall electricity bills, submetering may not result in the energy conservation and electricity savings it is intended to achieve unless tenants have the ability to effectively control the amount of electricity used for heat." We therefore ordered that the Petitioner's submetering plan include the installation of "effective thermostats in the major living or sleeping spaces in each dwelling unit in each building (emphasis added)."[55]

Petitioner's plan to install thermostats in the living rooms of all apartments prior to commencement of submetering satisfies our requirement that thermostats be installed in either the living room or sleep area. It also goes one step further than what we required in the 2010 Riverview II Order, in that Petitioner commits not to begin submetering until all the thermostat installation is completed. Since Petitioner makes this additional commitment, the tenants' and Assemblyman Kellner's complaint that thermostats have not yet been installed is moot.

Tenants' and Assemblyman Kellner's concern about the potential use of a new technology appears to be a red herring. Petitioner is not proposing to use this technology. The technology that it is proposing, i.e., programmable thermostats in each apartment's living room, provides a more than adequate improvement in each tenant's ability to control the amount of electricity they use and fully meets the Commission's objective as described in the 2009 Rehearing Order and the 2010 Riverview II Order.

[55] 2009 Rehearing Order 24.

Thermal Imaging Report

On January 3, 2011, CUATA submitted a Thermal Imaging Report admittedly made by an amateur, which purports to have "identified invisible drafts" and cold room temperatures like those about which tenants have complained. Some temperatures were recorded in Celsius, some in Fahrenheit, and thermal "pictures" were taken of various walls, outlets and windows in each building. Petitioner's expert, KGS Buildings, however, concluded that CUATA's report could not be relied upon for the purpose for which it was offered -- to show that the insulation at the buildings is poor, allowing for excessive infiltration of outdoor air. Neither could it be used to assess each building's energy efficiency level because tenants misapplied "the physical mechanisms that govern infra-red thermography and building heat loss;" therefore, the data tenants collected did not support these conclusions.[56]

As we acknowledged in the 2009 Rehearing Order, due to the era in which these cinder-block buildings were completed, insulation is poor and can only marginally be improved because the space for wall insulation is just a few inches wide.[57] Given the problems Petitioner's engineers raised with CUATA's Thermal Imaging Report, it cannot be credited as evidence of the level of insulation at these Petitioner buildings. More importantly, we developed the Financial Harm Test to evaluate the appropriateness of submetering based on actual tenant usage. That evaluation includes the impact of building-specific attributes including insulation, thermal characteristics, and other factors cited by CUATA.

[56] Petitioner February 18, 2011 Reply, Exhibit E at 9.

[57] 2009 Rehearing Order 19, fn. 7.

Termination of Service for Non-Payment of Electric Charges

In their 2008 petitions for rehearing, tenants complained to the Commission that apartment leases included a provision that unlawfully treated electric charges as rent. Tenants argued that in characterizing electric charges as rent, these provisions seek to allow landlords to evict a tenant for non-payment of electric charges even when the tenant is current on rent, and that the provision of such a remedy violates HEFPA, which provides for termination of electric service as a remedy for non-payment of electric charges.

While our 2009 Rehearing Order directed Petitioner not to treat electric charges as rent, we revisited this issue in our 2010 Riverview II Order. There we revised our outright prohibition on the characterization of electric charges as "rent". We concluded that, given Riverview II's inability to terminate submetered service due to technical limitations, we would not prohibit the landlord from pursuing the civil remedies it may have based on the nonpayment. We explicitly provided, however, that the landlord must provide the tenant with all the procedures and protections available to the tenant under HEFPA before commencing any civil proceedings, including those for eviction. Thus, while we did not prohibit outright the characterization of unpaid electric charges as "rent", we required that all of the protections and procedures available through HEFPA (notably, the option to continue service through a deferred payment agreement and extensive consumer complaint review and procedures opportunities from both the landlord and DPS) be provided. In reaching this conclusion in Riverview II, we emphasized that Riverview II's submetering equipment could not be used to terminate electric service to an individual apartment and that the design and installation of this equipment preceded our determinations in these cases to limit the

landlord's ability to characterize unpaid electric charges as "rent".

By requiring that the mechanisms and procedures specified in HEFPA must come first, our 2010 Riverview II Order provided that all HEFPA protections and procedures must be followed before the landlord seeks a civil remedy for non-payment. Put another way, since HEFPA compliance must come first, our order actually restricts the landlord's ability to seek or benefit from any civil remedies (including eviction) that may be available to him or her. In this way, the tenant is assured of receiving both the benefit of HEFPA's protections as well as the notice and opportunity to be heard that would normally be provided in connection with any civil action brought by the landlord.

Petitioner claims it is similarly-situated to the Riverview II owners in that the submetering equipment it installed after its submetering petitions were granted in 2008 and before our 2009 Rehearing Order cannot be used to disconnect submetered service to individual apartments. Therefore, in its revised submetering plans, Petitioner asks that it be treated similarly to Riverview II and commits to "afford the tenant all notices and protections available to such tenant pursuant to HEFPA before any judicial action based on such non-payment is commenced."[58]

[58] Petitioner October 21 Filing 10. Indeed, Public Service Law §53 requires that submeterers provide residential end-users all HEFPA protections. Petitioner's affirmative commitment to do so in its submetering plans prior to beginning any civil eviction proceedings acknowledges Petitioner's full awareness of this requirement. It also assures that the tenant would not be confronted with an eviction or any other civil enforcement action while he or she was within the protections and procedures of HEFPA.

Relying on the 2009 Rehearing Order which would operate as a complete prohibition on civil proceedings as a remedy for non-payment, Assemblyman Kellner claims that Petitioner's revised submetering plans are prohibited by the Public Service Law, "contradicting both the law and the express public policy of the State of New York."[59] Similarly, CUATA expresses "alarm" that Petitioner's submetering plans allow for eviction for non-payment of electric charges.[60] Assemblyman Kellner, however, fails to identify precisely which law, other than HEFPA, is abridged when eviction is used as a remedy for failure to pay electric charges. Assemblyman Kellner further claims that Petitioner should not be able to justify the remedy of eviction due to its inability to terminate submetered service, stating that having chosen to install the type of submetering equipment that does not allow for service termination, Petitioner's "disadvantage is self-imposed."[61] CUATA argues that Petitioner may target "vocal" tenants and subsidized tenants for eviction if leases that allow eviction for non-payment stand.

As noted above, the resolution of this issue in the Riverview II case is not inconsistent with and does not create a exception to HEFPA; it actually assures that all HEFPA protections will be provided to the tenant. Thus, the tenant who is not current on his or her electric bill will be offered the same opportunities to become current or to continue service through a deferred payment agreement as are provided to a

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[59] Assemblyman Kellner 14.

[60] CUATA 4.

[61] Assemblyman Kellner 13.

utility direct metered customer, or to have his or her complaint heard and resolved by the Public Service Commission.[62]

Here, as in the 2010 Riverview II Order, we recognize that a balance must be struck between our policy to encourage submetering without imposing additional burdens on submetered tenants and the recognition that many landlords have invested in submetering systems that could not terminate service to individual apartments, pre-dating the concerns about the treatment of electric charges as "rent" first voiced in the rehearing petitions in these cases. Thus, when Petitioner's submetering petitions were approved in 2008, without objection from any tenant, tenant group or elected official, the Commission's order did not object to the Landlord's proposal to characterize the charge for electricity, like other charges for parking or for the use of an air conditioner, as "rent". We did not at that time prohibit the use of civil proceedings to obtain unpaid electric charges.

We conclude that the balance struck in the 2010 Riverview II Order should be applied here as well. Our policy, as reflected in that Order, is to encourage submetering, even in those instances where the landlord's prior investment in submetering equipment does not enable the landlord to terminate electric service to individual apartments, and to avoid the imposition of additional burdens on submetered tenants. Here, as in Riverview II, we make explicit that, in all cases, the tenant who is in arrears on his or her electric charges will receive the benefits of all of the protections and procedures

[62] As we stated in the 2010 Riverview II Order, submeterers may not require that billing disputes be resolved by binding arbitration because HEFPA provides a different dispute resolution procedure.

available under HEFPA and that these protections and procedures will be provided before the Landlord seeks any other civil remedy based on such arrears. We will not, through this order, attempt to limit further the civil remedies available to Petitioner when these HEFPA protections and procedures have been exhausted.

Assemblyman Kellner's and CUATA's concerns that tenants will be targeted for eviction in this case have no basis in the record. Moreover, HEFPA enunciates precise timeframes with which Petitioner, and any submeterer, must abide in the event of non-payment and during which submeterers must negotiate deferred payment plans. Tenants likely are unaware of these protections because electricity has always been included in rent; however, notice of their HEFPA rights will coincide with approval of submetering and, pursuant to Public Service Law §44(3), will be provided annually to all tenants. Any evidence that a low income or Section 8 tenant who falls behind in their electric charges is being unjustifiably or unfairly targeted, as Assemblyman Kellner and CUATA fear, would be identified during resolution of the billing disputes before our Office of Consumer Services.

We cannot agree that it is Petitioner's "self-imposed" problem that it installed submeters that cannot shut off service to individual apartments. When the equipment was installed, the importance of having the ability to terminate service to individual apartments was not apparent. If the importance of this capability had never been raised before, it cannot be argued successfully that the absence of this capability in Petitioner's equipment is "self-imposed". Of course, in future submetering petitions we will look closely at any petitioner's claim that it be permitted to proceed with submetering even

though the submetering equipment it has chosen to install cannot terminate service to individual apartments.

For these reasons, we will order Petitioner, like the owners of Riverview II, in the event of non-payment of electric charges, to afford the tenant all notices and protections available to such tenant pursuant to HEFPA before any judicial action based on such non-payment is commenced. The HEFPA notices and protections that we require the submeterers to provide before any judicial proceeding commences, include, but are not limited to, deferred payment agreements as set forth in Public Service Law §37 and 16 NYCRR Part 11, budget and levelized billing plans as set forth in CASE 08-E-0439, Public Service Law §38 and 16 NYCRR Part 11, the complaint handling procedures as set forth in Public Service Law §43 and 16 NYCRR Part 11, and the special protections for medical emergencies, elderly, blind and disabled customers, and for cold weather periods as set forth in Public Service Law §32 and 16 NYCRR Part 11.[63]

In as much as Petitioner, like the Riverview II submeterer, submitted submetering plans that commit to providing all HEFPA protections prior to civil proceedings, we will accept Petitioner's plans.[64] Those plans include the manner by which Petitioner will provide all HEFPA protections to tenants who have unpaid electric charges prior to civil proceedings.

Notice to Tenants

In the 2009 Rehearing Order and the 2010 Riverview II Order, we emphasized the need for submeterers to provide tenants

[63] 2010 Riverview II Order 27-28.

[64] 2010 Riverview II Order 27; Petitioner October 21 Filing 10-11.

not only certain statutory and Commission-ordered protections, but also the need to provide adequate prior notice to tenants of those rights.[65] We noted that, when tenants move into a rented dwelling under one set of circumstances - electricity being included in rent - and those circumstances change due to the landlord's decision to submeter, particular care must be taken to ensure that tenants are made fully aware of all necessary information under the new submetering paradigm, including changes in lease terms to avoid tenant confusion and an opportunity to adjust to paying a monthly electric bill.

Petitioner's submetering plans include a commitment to the same type of annual notice of the statutorily-required HEFPA-protections, notice to individual tenants of when submetering services will begin, and the existence of the Department's consumer complaint procedures as a mandatory alternative to any other conflict resolution procedure the Landlord or lease might seek.[66]

Tenants do not complain about the notice they have received about Petitioner's revised submetering plans. Assemblyman Kellner, however, complains that Petitioner "[f]ailed to comply with the Rehearing Orders' instructions regarding notice to tenants of the 45-day comment period . . . and failed to file the required affidavit documenting compliance."[67] According to Assemblyman Kellner, tenants, as of December 23, 2010, had not been told of the 45-day comment period, citing tenants' statements that they had not received

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[65] See Public Service Law §§30 and 44.

[66] Petitioner October 21 Filing 11.

[67] Assemblyman Kellner 2, 15-16.

notice to question "how seriously the Petitioners have taken their obligation to fulfill the terms of the Rehearing Order."

First, Assemblyman Kellner's interpretation of the 2009 Rehearing Order's notice requirements is incorrect. As we made clear in that order, in requiring such additional notice of submetering petitions, we were referring to "future cases," not this case, which has been pending since 2008. Moreover, Petitioner's revised submetering plans could have been deemed a compliance filing, not requiring any further SAPA notice and comment process.

Assemblyman Kellner is incorrect that tenants received no notice of the revised submetering filings and lacked an opportunity to comment. Petitioner provided an October 29, 2010 notice of its filing to each tenant, which it served door-to-door on 2700 apartments. That individual notice informed tenants of their 45-day opportunity to comment pursuant to SAPA. We received at least 130 comments even before the Secretary extended the comment period, which supports a finding that Petitioner's initial notice was adequate and Assemblyman Kellner's complaints about a lack of notice to tenants are baseless. Nonetheless, a new SAPA notice was made seeking further comments, and the Secretary authorized two extensions of the comment period in this case as a courtesy that we believed would not prejudice either party.[68]

HEFPA Compliance

Staff reviewed the HEFPA documents submitted by Petitioner and finds them in compliance with the HEFPA notice and protections required. They include, but are not limited to,

[68] Further, the Secretary continued to receive tenant comments long after the ultimate February 15, 2011 deadline.

deferred payment agreements as set forth in Public Service Law §37 and 16 NYCRR Part 11, budget and levelized billing plans, as set forth in Public Service Law §38 and 16 NYCRR Part 11, the complaint handling procedures, as set forth in Public Service Law §43 and 16 NYCRR Part 11, and the special protections for medical emergencies, elderly, blind and disabled, and for cold weather periods as set forth in Public Service Law §32 and 16 NYCRR Part 11.

CONCLUSION

Based on the foregoing and as provided in this Order, we remove the stay of submetering at the Frawley Plaza, Metro North, and KNW Apartment complexes.

The Commission Orders:

1. With respect to the submetering plans submitted by Frawley Plaza, LLC, Metro North, LLC and KNW Apartments, LLC, such plans are approved with the conditions described herein; the permanent stay of submetering imposed by the 2009 Rehearing Order is lifted; and submetering may begin after all of the conditions described in this Order have been met and Petitioners have submitted compliance filings to the Office of the Secretary to the Commission and the Director of the Office of Consumer Policy and have received confirmation that such filings are complete and in accordance with this Order.

2. As set forth in the body of this Order and as a condition for the lifting of the permanent stay of submetering set forth in our 2009 Rehearing Order, Petitioner shall demonstrate by affidavit in the compliance filings required in ordering clause 1 and for each of the complexes identified in ordering clause 1, inter alia, that:

(a) Petitioner is registered as a HEAP vendor and shall implement and maintain an ongoing HEAP enrollment program;

(b) Petitioner has, before submetering commences, completed in each building its program to install in each apartment one programmable, accessible, thermostat located in the primary living area. Such demonstration in the compliance filings shall document the thermostat installation program's procedures, and the effectiveness of such procedures, when access to apartments has been unavailable and the Petitioner has been unable to complete the installation;

(c) Petitioner has provided to all tenants whose apartments include a refrigerator manufactured before 2001, (1) notification that they qualify for the installation of an Energy Star® rated refrigerator, (2) at least two opportunities for entry to the tenant's apartment so that the refrigerator replacement can be made;

(d) Petitioner has completed its NYSERDA ERP by providing a certificate of completion; and,

(e) Petitioner has completed the pre-submetering energy efficiency education requirements as set forth in this Order.

3. As set forth in the body of this Order, Petitioner shall provide all notices and protections available to tenants pursuant to HEFPA before any judicial action based on any non-payment of electric charges will be commenced in accordance with the body of this order.

4. Notice of when submetering will begin shall be supplied by Petitioner to tenants no less than two months prior to the commencement of submetering.

Petitioner shall provide notice of HEFPA protections available to all submetered tenants annually and such notice shall:

(a) include explicit reference to the complaint procedures available to tenants under the Home Energy Fair Practices Act, PSL Article 2;

(b) include notice that the tenants may, at any time, contact the Department of Public Service if they are dissatisfied with the decision of building management and/or their agents regarding an electricity complaint, which shall include actual DPS contact information; and

(c) notify tenants that the Article 2 complaint procedures are available to tenants notwithstanding the pendency of any alternative procedures offered by the Petitioner or described in the tenants' leases.

5. Petitioner shall provide to tenants in each apartment complex written, educational materials on energy-consumption and energy savings, energy efficiency education, access to an energy efficiency expert on the timetable and as set forth in the body of this Order.

6. The Secretary may extend the deadlines set forth in this order.

7. These proceedings are continued.

By the Commission,

Jaclyn A. Brilling
Digitally Signed by Secretary
New York Public Service Commission

JACLYN A. BRILLING
Secretary