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STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

Case 89-E-1115 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16NYCRR, in Relation to Complaint Procedures--Appeal by Long Island Lighting Company of the Informal Decision Rendered in Favor of Jericho Jewish Center; Temple Beth Torah; Congregation Odab Zedek; Temple Beth El; Hewlett E. Rockaway Jewish Center; Baywater Jewish Center, filed in C 26358 (E959053)

COMMISSION DETERMINATION
(Issued and Effective February 26, 1992)

This is an appeal to the Commission by the Long Island Lighting Company, the utility, from a decision dated July 11, 1989. Complaints were brought by URAC Corporation and Utility Check, Ltd., consultants, on behalf of various large religious institutions, the complainants, who contended that they were denied the opportunity to be placed on Service Classification #1-Multiple Rate Periods (SC-1 MRP) from January 1, 1980, when the rate became effective, because the utility failed to inform them of the rate, failed to install the required meters and failed to bill them on the rate. The hearing officer concluded that the utility was deficient in providing notice of the SC-1 MRP rate for which complainants were eligible, as well as to all similarly situated customers. However, due to the difficulty of estimating bills prior to a change in the tariff in 1982, the utility was directed to re-calculate the bills for the period from February 1982, until such time as a time-of-day meter was

installed based upon the historical usage after such meter was installed, and to refund any difference in the complainants' favor, with interest.

For the reasons stated below, we grant the utility's appeal and reverse the hearing officer's decision.

PROCEDURAL HISTORY

Complainants, represented by URAC Corporation and Utility Check, Ltd., contacted the utility and subsequently the Consumer Services Division on various dates from December 11, 1986 to March 25, 1988, contending that their clients had been denied the SC-1 MRP rate since the time it became effective on January 1, 1980, until early 1983, when the utility began informing its large religious customers about the rate and obtaining their agreement to have the time-of-day meters installed for the purpose of seeing whether or not they wished to change to the MRP rate. Consultants sought retroactive rebilling on the SC-1 MRP rate from January 1, 1980, until the time when the accounts in question were transferred to the rate, with interest applied on the credit. Six cases with the same complaint were consolidated for informal review.

The utility argued that complainants were not entitled to any retroactive billing, primarily because the SC-1 MRP rate was experimental at the outset, was fraught with technical problems requiring a moratorium on placing new customers on the rate within the first year, was not mandatory for complainants,

and, therefore, there was no duty to advise them individually of the rate. Further, the utility stated that the religious accounts in question were all billed on the proper rate as required by Public Service Law 76,[1] and that it was under no obligation to provide the customers with the lowest possible rate.

Further, the utility noted that there was no certainty as to whether the SC-1 MRP rate would result in lower bills for complainants during the time in question, particularly since the original tariff included a temperature control period which was eliminated in 1982.

The hearing officer issued a decision on July 11, 1989. The hearing officer summarized the history of the SC-1 MRP rate, noting that the Commission ordered the utility to proceed with a mandatory time-of-day rate for large residential customers on September 1, 1977, and gave qualifying religious customers the choice of this rate as an option. There was some delay in implementing the rate, but by August 1, 1979, almost all of the nearly 1,000 mandatory accounts had the time-of-day meters

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1. "No gas corporation, electric corporation or municipality shall directly or indirectly, charge, demand, collect or receive from any corporation or association organized and conducted in good faith for religious purposes...a rate for any gas or electric service utilitized exclusively in conection with such religious purposes...greater than the rates or charges charged, demanded, collected or received by such gas corporation, electric corporation or municipality from domestic consumers in the same village, town or municipality." Public Service Law, Sec. 76.

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installed. These customers received their regular SC-1 bill and a "dummy bill" (showing what the bill would be on SC-1 MRP) until January 1, 1980, when actual billing began on the new rate.

The hearing officer concluded that the utility did not advise its religious customers in 1979 about the SC-1 MRP rate option, and therefore, was deficient in its obligation as noted in the tariff "[to] endeavor to assist the applicant in the selection of the Service Classification which may be most favorable to his requirement," and that this obligation extended to informing existing customers of a new, more favorable rate. However, because it was impossible to estimate bills at the SC-1 MRP rate prior to 1982, because no records for complainants' usage during the temperature controlled periods existed, the hearing officer ordered the utility to use the complainants' usage patterns on their time- of-day meters after 1983 to determine the basis for estimating usage from February, 1982, to the time complainants were placed on the SC-1 MRP rate. The utility was ordered to rebill complainants, and all similarly situated customers, from February 1982, through the installation of time-of-day meter installation, and to apply interest to any credit.

By letter dated September 5, 1989, the utility requested a reconsideration of the hearing officer's decision and raised the following points:

(1) The utility notified all residential customers, including religious customers, of the SC-1 MRP rate in 1980 and 1981, according to newly located brochures which were included as

documentation of its position.

(2) The utility adhered to PSL 76 by billing all religious customers on a domestic rate during the entire period in question.

(3) There is no factual basis for complainants' claim that the SC-1 MRP rate would have been more favorable during the period in question.

(4) The utility is not liable for interest on customer over-payments resulting from the billing of religious accounts on the original domestic rate.

On October 2, 1989, the hearing officer rejected the utility's request for a reconsideration of the decision. The hearing officer concluded that the brochures recently located by the utility did not satisfy its obligation to inform customers of a new rate.

The hearing officer also rejected the utility's point that it was impossible to determine which rate structure would be most favorable stating that because the utility was deficient in the first place by not placing complainants on the time-of-day rate, "it would be inequitable for the utility to be permitted to use their own failure as a shield against the remedy that is appropriate." Further, the hearing officer rejected the utility's objection to the application of interest by stating that the customers' overpayment in this instance was caused by the utility's deficiency in not providing sufficient notice of the service classification most beneficial to the complainants.

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POINTS ON APPEAL

By letter dated December 9, 1989, the utility appealed from the informal hearing decision, raising the following issues:

(1) The hearing officer erred when concluding that the utility did not properly notify all religious customers of the SC-1 MRP rate as an option.

(2) All complaints alleging a utility deficiency are stale for any time prior to December 11, 1980, six years from the date any complaint was first brought to the utility, according to the six-year limitations period.

(3) The utility satisfied the obligation imposed by PSL 76 by billing the religious customers on a domestic rate, and the tariff does not obligate it to guarantee the lowest possible rate.

(4) The hearing officer erred when assessing interest on the alleged over-payments from the original billing.

SUMMARY OF FACTS

(1) In 1977, the Commission approved a time-of-day rate, SC-1 MRP, for large residential customers and directed the utility to proceed to install time-of-day meters for those customers required to be placed on the rate--approximately 1,000 residential customers using 45,000 kwh (kilowatthours) per year.[2] Due to a legal challenge to the utility's commercial time-of-day rate, the

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[2.] C. 26887, Opinion No. 77-11, September 1, 1977.

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actual implementation of the order was delayed, but by August 1979 the mandated customers' meters had been installed, and the customers received "dummy bills" showing what would have been billed on the new rate until January 1, 1980, when actual billing commenced.[3]

(2) At the outset, the SC-1 MRP rate was mandatory for residential accounts "[w]hen the annual consumption for an existing account exceeds 45,000 kwh...applicability optional to qualifying religious accounts." The rate had three periods: on-peak, 10:00 AM to 10:00 PM except Sunday; off-peak, 10:00PM to 10:00 AM and Sunday; and a temperature controlled period.[4]

(3) In June and September 1980, the utility sent pamphlets describing all of its rates to customers as bill inserts. SC-1 MRP was described an an option for religious customers. In

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[3] During the course of Case 26887, the SC-1 MRP rate was discussed at length. Testimony by Mr. Russell, a utility rate designer, characterized the SC-1 MRP rate as "[r]easonable experimentation in connection with rate design." Further, testimony by utility staff indicated that the rate would be limited to the larger residential users, for which it was mandatory, that the utility was uncertain whether the rate would achieve its purpose of shifting demand of large users to off-peak times, and that the utility staff focussed exclusively on the usage patterns of residential customers, not the religious customers for whom the rate was an option if they used 45,000 kwh or more per year.

[4] The temperature controlled period was defined as the period beginning with the first clock hour following the hour in which the temperature in Hicksville reached 81 degrees and extending until 10:00 PM, Sunday not included. Customers were alerted by a radio signal from the utility when the temperature controlled period began.

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February and May, 1981, the utility sent similar general rate information pamphlets to all customers.

(4) On April 22, 1981, at the utility's request, the Commission ordered a moratorium on adding any new customers to the SC-1 MRP rate due to technical problems with the temperature controlled part of the rate. At that time, only the original customers, almost 1,000, were on the rate. On February 2, 1982, the temperature controlled portion of the rate was eliminated.[5]

(5) On January 24, 1983, the Commission returned to the matter of the SC-1 MRP rate, and it found that "[a]n immediate transfer of eligible customers to the expanded class is simply infeasible."[6] The Commission recognized that the utility needed time to install the time-of-day meters, to advise customers and give them the "[e]ffect of the MRP rates before actually being transferred to the new service classification."[7]

(6) Beginning in late 1982, the utility began contacting its religious customers who used 45,000 kwh or more a year to advise them of the SC-1 MRP rate and to obtain a written agreement to

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5. C. 27774 - Order Allowing Elimination of the Temperature Controlled Rate Period in the SC-1 MRP Rate Structure, February 2, 1982.

6. C. 27774, Opinion 83-2, 23 NY PSC p.419.

7. Ibid.

have the time-of-day meters installed. The agreement guaranteed that for the first year after the meter was installed, whichever rate was most advantageous for the customer would prevail, and they would continue to be billed on that rate in the future. This arrangement was not required either by the Commission or the utility's tariff; it was undertaken voluntarily by the utility.

(7) From December 11, 1986 to March 25, 1988, URAC and Utility Check, Ltd. filed complaints on behalf of six separate religious customers of the utility asserting that they had been denied the opportunity to be placed on the SC-1 MRP rate from 1979 to sometime in 1983 or 1984, by which time all complainants had been placed on the rate classification in question.[8]

(8) Staff requested information about these accounts from the utility, and upon review, advised the consultants that, because of the technical problems encountered with the initial MRP rate design and the subsequent moratorium on adding customers to the approximately 1,000 mandatory accounts, the utility acted in

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[8.] The particular circumstances of the six acounts were as follows: Baywater Jewish Center declined the SC-1 MRP rate in December 1982; on September 20, 1984, the utility notified the customer that the MRP rate was more advantageous, gave credit for the difference from January 12, 1983, and the rate was changed to SC-1 MRP as of August 9, 1984. Temple Beth El elected to remain on SC-1 until a comparison with the MRP rates in September 1984 showed it to be more advantageous, at which time the account was transferred to SC-1 MRP and the difference from March 1983 to August 1984 was credited to the account. Congregation Ohab Zedek elected to remain on SC-1, which was, and remains, more advantageous for it. The remaining three named complainants elected to be placed on SC-1 MRP as per the utility's agreement.

accordance with Commission orders during the period in question. Further, because the utility subsequently installed the meters and provided a year's comparison for the optional religious customers, no refund for any charges during the period in question was warranted.

(9) URAC and Utility Check, Ltd. requested informal hearings during 1988. Because of the number of similar complaints involved, the complaints were consolidated for an informal review. The consultants agreed to this consolidation.

URAC and Utility Check, Ltd. held the position that the subject accounts qualified for the SC-1 MRP rate from 1980, and they requested a retroactive credit adjustment, with interest, for the difference between that billed under the SC-1 rate and that of SC-1 MRP.

The utility's position, as outlined in a "Memorandum of Law" submitted on October 26, 1987, was as follows:

(a) Limiting the availability of the experimental SC-1 MRP rate to the original 1,000 mandatory customers until January 25, 1983, was in conformance with Commission orders as part of the utility's rate filing in C. 27774.

(b) There is no factual basis for the claim that the SC-1 MRP rate would have been a more favorable rate for complainants prior to March 15, 1983.

(c) Complainants were billed as residential customers in compliance with the Public Service Law until opting for metered time-of-day rates.

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(d) Complainants' claims for an adjustment prior to December, 1980, are barred by the six-year limitations period, and further, because the SC-1 MRP rate only became effective for the original 1,000 mandatory customers on January 1, 1980, complainants' claim for an adjustment prior to January 1, 1980 is without merit.

(10) The hearing officer issued a decision on July 11, 1989. The hearing officer noted that the record prior to late 1982 indicated that the utility did not advise its religious customers about the SC-1 MRP rate, based on the absence of evidence such as bill inserts, letters to religious customers, or any other written notice provided by the utility. Further, the hearing officer noted that testimony during the rate case which authorized this rate indicated that no "real thought was given to the manner by which, or exactly when, religious customers would be notified of the option to be placed on the rate."

The hearing officer concluded that the utility tariff obligated it to "endeavor to assist the applicant in the selection of the Service Classification which may be most favorable to his requirement," and that this duty extends to informing existing customers of a new optional rate.[9] The hearing officer concluded

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[9] "The Company will endeavor to assist a customer in the selection of the Service Classification which may be most favorable to his requirements, but in no way can the company make any warranty, expressed or implied, as to the rates, classification, or provisions favorable to future service to, or furture requirements of, any applicant or customer." PSC No. 7 - Electricity: 4th revised Leaf No.7 112A.1.3.

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that the utility had no legitimate basis for not providing some notice of the SC-1 MRP rate to religious customers in 1979 when the mandatory customers were being placed on the rate. However, because no data existed for the period when the temperature controlled rate was included in the service classification, any rebilling for this period would be highly speculative. Further, the fact that there was no evidence of any intent by the utility to deceive, and that when the utility did advise the customers of the rate option it went further than was necessary to guarantee the best rate, led the hearing officer to conclude that rebilling between January 1980 and January 1982 was unnecessary and inappropriate.

However, the hearing officer found that for the period of February 2, 1982, when the temperature controlled feature was removed, through early 1983, before the large religious accounts were placed on the rate, there was a pattern of recorded usage available for rebilling--namely, that based on the first year subsequent to the installation of the time-of-day meters in 1983. Therefore, the hearing officer directed the utility to analyze the usage for the year after the time-of-day meters were installed and to re-calculate bills for the period from February 1982 through the time when the time-of-day meters were installed. Any calculation which resulted in a lower bill was ordered to be rebilled with interest applied. The hearing officer extended this decision to all similarly situated customers.

(11) On September 5, 1989, the utility filed a request for a

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reconsideration of the hearing officer's decision based on the fact that records of rate brochures mailed to all residential customers in 1980 and 1981 had been recently located. The utility argued that, because this evidence indicated that all residential customers, including religious accounts, were notified of the SC-1 MRP rates in 1980 and 1981, the basis for the hearing officer's conclusion that the utility was deficient in its obligation to notify customers of the rate no longer obtained.

Further, the utility asserted that PSL 76 requires that religious customers be charged no more than the residential rate but does not require that such accounts be charged the lowest possible residential rate or an experimental rate which had to be subsequently modified.

The utility also asserted that there was no factual basis for concluding that the SC-1 MRP rate would have been more favorable than SC-1 prior to March 15, 1983. In addition, the utility denied liability for interest on customer overpayments resulting from the billing of religious accounts on the original domestic rate.[10] The utility asserted that it adhered to PSL 76 in placing the religious customers on a domestic rate, that it provided these customers with information regarding the SC-1 MRP rate in 1980, within months of the effective date of the new rate,

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[10]. "A customer overpayment is defined as payment by the customer to the utility in excess of the corrct charges for electric service supplied to the customer...." 16 NYCRR 145.2

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that any rebilling was highly speculative, and therefore, the standard for overpayment as stated in Commission regulations was not met and neither refunds nor interest were warranted.

(12) By letter dated October 2, 1989, the hearing officer rejected the utility's request for a reconsideration of the decision. The hearing officer found that the brochure distributed in 1980 was ineffective as notice of the availability of the rate to large religious customers, and it failed to properly advise the customer. Further, the hearing officer concluded that the newly located brochures were of no significance because, by the time the February and May 1981 brochures were distributed, there was a freeze on adding new customers on the SC-1 MRP rate. The hearing officer determined that Commission regulations extended to this case where "[b]ut for the utility's deficiency, the customer would have been billed on a different service classification, [and that] the payment of interest is necessary for a fair and equitable resolution of this complaint."[11]

DETERMINATION

The central issue in this matter is whether the utility was deficient in notifying its large religious accounts of the SC-1 MRP rate as an optional service classification to the regular domestic rate.

[11.] 16 NYCRR Sec. 145.1.

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This matter must be viewed in light of the circumstances surrounding the implementation of the SC-1 MRP rate. The Commission's main goal in time-of-day rates is to achieve pricing fairness, by having prices reflect actual costs. Because the costs are higher during peak load hours, time-of-use rates should reduce peak loads. Such reduction mitigates the need for additional generating capacity and the need to run the least efficient units. The record is clear that even though religious accounts were to be given the option of the time-of-day rate, the major target for the rate was the usage patterns of very large single-family households, and the major focus of the testimony during the rate case from the utility, from staff and from intervenors, was the single-family household on Long Island. It is also clear from the record that there was great uncertainty whether this rate would modify usage patterns and whether the rate would result in lower bills for customers.

Likewise, both staff and the utility were concerned with the potential for problems with the radio signaling mechanism required to alert customers of the commencement of the temperature controlled rate period. That this feature of the rate was eliminated about fifteen months after it was introduced is clear evidence that the concerns were well founded and supports the acquiescence by the Commission to the utility's decision to focus on the initial group of mandatory customers placed on this rate at the outset, as well as the Commission's later decision to add new customers in stages after the temperature controlled rate period

was eliminated, as noted in Opinion 83-2.

The utility's point on appeal, that the complaints under discussion in this determination are to some extent barred by the six-year limitations period, has merit. The first complaint was made to the utility on December 11, 1986, and therefore, claims arising prior to December 11, 1980, are beyond the purview of this Commission to consider.[12] The utility deficiency cited by the hearing officer allegedly occurred in 1979, i.e., the failure to notify its religious customers of the optional SC-1 MRP rate, but the utility cannot be held accountable on the basis of action taken, or not taken, during that period.

The hearing officer is correct that notice of the new rate was required in meeting the utility's obligation to assist its customers, including existing customers, in selecting the most beneficial rate. However, neither the utility's tariff nor any of the cases cited by the hearing officer specifically define what constitutes a reasonable effort to assist customers in selecting the most advantageous rate. The utility distributed a brochure to all customers in June and September 1980, in which the SC-1 MRP rate was one of the rate classifications defined for customer information. The brochure noted that the SC-1 MRP rate was optional for some religious accounts. The hearing officer found

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12. See: C. 26358, Queens Jewish Center (Issued and Effective October 17, 1988) and Opinion and Order 89-19, Westledge Nursing Home, et. al. (Issued and Effective May 14, 1990), p. 9.

this to be inadequate notification to religious customers of the new optional rate. With the benefit of hindsight, the hearing officer determined that the utility should have specifically contacted all members of the affected class about the optional rate.

The Public Service Law (PSL 66.12) requires utilities to publish new rates in local newspapers and to maintain their rates on public file in their offices, and utilities routinely provide additional information about their rates with bill inserts. These actions fall within the range of "reasonable efforts" to advise customers of its rates as a way of assisting an existing customer in selecting the most beneficial rate. Accordingly, we find that the utility's action in sending a general rate brochure in 1980, which included information regarding the SC-1 MRP rate as one for which some religious accounts were eligible, was sufficient to carry out the utility's obligation to assist these customers in selecting favorable rates. All such affected customers were free to contact the utility for further assistance in deciding whether that rate was the most beneficial one for its account. The standard of notice articulated by the hearing officer in her decision far exceeds what was adequate or required in 1980, and it is unfair to hold the utility, ex post facto, to a standard of notice not articulated by the tariff, court decisions or the Commission.

The utility met its obligation to bill the religious customers on a rate no higher than the domestic rate. The SC-1 MRP was an

optional rate which qualified customers could select. It is the utility's duty to act in good faith in advising the customer of its rates, but it is the customer who selects a service classification when options are available. It is reasonable to expect a customer to contact a utility in order to gain the information needed to make this decision after it has been notified that such options are available; that none of the complainants chose to do so in 1980 is not reason to assume that this was the result of any utility deficiency.

In order to assure that all aspects of this case have been properly addressed, we have thoroughly reviewed the entire complaint file. We determine that the utility's implementation of the SC-1 MRP rate was sound and in conformance with Commission orders, and the utility gave reasonable and timely notice to the optional customers of its availability. Therefore, we reverse the hearing officer's decision and grant the utility's appeal.