Attachment B

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October 27, 2009

Thomas Dowling, Supervisor
Informal Hearing Unit
Office of Consumer Services
New York Department of Public Service
90 Church Street
New York, NY 10007-2919

Re: Hazel Towers – Case No. 814524
Informal Hearing Statement on Behalf of Hazel Towers Tenants Association ("HTTA")

Dear Mr. Dowling:

Thank you for your letter of October 9, 2009, requesting notification of the specific issues, of the thirteen addressed in the Initial Decision ("ID"), that remain unresolved "and the relief you believe an Office of Consumer Services informal hearing officer may be able to provide." An enumeration of the unresolved issues is provided below. For convenience, each issue bears the same numerical designation as in the ID.

ID Issue 1 The language contained in Commission Order 00-E-1269 has not been incorporated into the tenants' leases.

a. The ID erroneously approved a defective, proposed lease rider to govern the rates, terms and conditions of submetered electric service

(i) Failure to include provisions mandated by the Submetering Order

The ID approved a defective proposed lease rider to fulfill the Submetering Order requirements that "the method of rate calculation, rate cap, complaint procedures, tenant protections, and the enforcement mechanism will be incorporated in plain language in all leases governing submetered apartments." The defective, proposed lease rider is appended to the ID as Exhibit B.

Nelson Management's *ex parte* communications with OCS and its *ex parte* provision of a proposed lease rider to OCS cannot establish or substitute for valid, signed agreements with its submetered customers containing the rates, terms and conditions of electric service at Hazel Towers.

(ii) Defective Complaint Procedures

The proposed lease rider contains new complaint procedures that are not in compliance with the Home Energy Fair Practices Act ("HEFPA"), and it does not provide for the method of rate calculation and adequate tenant protections, all in violation of the plain words of the Commission's Submetering Order. The unlawful, proposed lease rider provisions are set forth below in *italics*, with the deficiencies noted under each.

"1. Hazel Towers is a submetered facility. While Hazel Towers, LP is the owner of the building, the billing for electricity is currently administered by Hazel Towers' consultant, American Metering and Planning Services (AMPS) as agent for Hazel Towers Company. Representative of AMPS are available at (718) 997-9500. If you have an electrical emergency please call Hazel Towers Company at (718) 997-9500. If you would like to contact Hazel Towers Company by mail, please write to 118-35 Queens Blvd, Forest Hills NY 11375."

- This text advises submetered customers to call Hazel Towers if there is an "electrical emergency." For submetered customers who have non-emergency complaints about their electric service, it does not provide anyone to contact. AMPS is not an electric company and has not been authorized by the Commission to provide electric service. AMPS is not a party to the lease, and has no contract with tenants. AMPS is not a party to this proceeding and Nelson Management has not filed with the Commission its contract with AMPS to outsource its administration of electric services. There is no evidence that AMPS is a successor that has assumed Nelson Management's duty to comply with HEFPA or the Commission's Order.[1]

"2. If you have complaints regarding electrical service that are not satisfied after speaking with a supervisor, please write to a Hazel Towers Company representative and include the action or relief requested. It can be in letter form and sent to Hazel Towers Company 118-35 Queens Blvd, Forest Hills NY 11375. The managing agent or representative shall investigate and respond to the complainant in writing if requested. You shall then be advised of the disposition of the complaint and the reason therefore. If you are dissatisfied with the managing agent's or the representative's response, you may request a review of said determination by filing a written protest within fourteen (14) days from the date of the response to the managing agent or representative. No particular form is required. You can also contact the Public Service Commission at New York State Department of Public Service, 3 Empire State Plaza, Albany, New York 12223 or call their toll free HELP Line at 1(800) 34203377 and file a complaint with the commission and seek to have the issue resolved by them. The website for the Public Service Commission is www.DPS.State.NY.US."

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[1] *See, Owners & Tenants Electric Co., Inc. v. Tractenberg*, 158 Misc. 677 (NYC Mun. Ct. 1956).

- The text above refers to communications with "a supervisor," but there is no instruction to call a supervisor, nor is any supervisor identified. The text quoted at (ii)(1), above refers to "owner" and "agent" and instructs tenants to call Hazel Towers in the event of an electrical emergency. Accordingly, Step 2 in the complaint process apparently requires customers to follow a requisite, but unidentified first step of speaking with an unnamed "supervisor."

- The telephone number to contact a "supervisor" is not provided. Rather, a written communication is required. Written customer complaints are not required by the Home Energy Fair Practices Act ("HEFPA").[2] The Commission's official rules for complaint handling stipulate that "[t]he utility shall allow complaints to be accepted and processed in a simple manner and form."[3] Many tenants may have difficulties in making written complaints due to lack of literacy or English proficiency, old age, or mental or physical disability.

- The proposed complaint procedures provide no time limitation for the "managing agent or representative" to respond following investigation of the written complaint. This unlimited time for response cannot satisfy the statutory HEFPA "promptness" requirement,[4] and stands in plain violation of the Commission's Submetering Order, which requires a response "within ten days of the receipt of the complaint." (Submetering Order at p. 3).

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2 Public Service Law ("PSL") § 43, 16 NYCRR Part 11.

3 16 NYCRR § 11.20. Complaints to the utility.

4 PSL § 43(1)(a).

- The proposed complaint procedures require "managing agent or representative" to respond to the complaint in writing, but only "if requested." The Submetering Order requires a "respon[se] to the complaint *in writing* within ten days of the receipt of the complaint." (Submetering Order at p. 3, emphasis added).

- The instruction: "If you are dissatisfied with the managing agent's or the representative's response, you may request a review . . . within fourteen (14) days from the date of the response to the managing agent or representative," is rendered unintelligible by its use of the preposition "to" rather than "from" in the underlined portion of the text.

- Complaints within a specified time are not required by HEFPA.[5]

- The notification of HEFPA rights must require disclosure that not only may the PSC be "contacted," but that the PSC will upon request make a written administrative determination of the complaint under its complaint handling procedures. Commission regulation 16 NYCRR § 11.20 requires the utility to notify complainants "of the availability of the commission's complaint handling procedures" when it decides any complaint or issue adverse to the complainant.[6]

- The proposed lease rider does not notify tenants about the protections of PSL § 43(c) with respect to disputed electric bills.

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5 Excluding consideration of the general, six-year limitations period for utility service complaints.

6 16 NYCRR § 11.20.

(iii) Unilateral changes in complaint procedures without 30 days prior filing, in violation of 16 NYCRR § 11.20

The ID erred in approving a proposed lease rider that unilaterally modified the complaint procedures provided in the Submetering Order, thereby unilaterally modifying the Submetering Order requirements without Commission approval. Nelson Management's changes to the Commission-ordered complaint procedures and its distribution of unilaterally imposed terms and conditions to tenants was unlawful and in violation of 16 NYCRR § 11.20, which requires that changes to complaint procedures be filed with the Commission 30 days in advance.[7] The complaint procedures were not modified in accordance with the regulation, or by petition to the Commission to modify the Submetering Order. They were also made without SAPA Notice, without prior filing and approval under PSL § 65, without notice to tenants, and without voluntary and informed tenant consent.

(iv) The ID is tainted by *ex parte* communications in violation of 22 NYCRR § 1200.

The ID received Nelson Management's new, proposed lease rider (appended to the ID as Exhibit B) *ex parte*, with no notice or consultation with counsel for HTTA. The Public Service Commission ("PSC") and Department of Public Service ("DPS") are "tribunals" as defined by Title 22 of the New York Code, Rules & Regulations, Section 1200.[8] In practicing before "tribunals,"

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[7] § 11.20 Complaints to the utility. "Every utility shall file with the commission its procedures for fulfilling the requirements of this section, and any changes in such procedures must be filed at least 30 days prior to implementation.

[8] *See,* 22 NYCRR § 1200.0. "'Tribunal'" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative

> lawyers shall not "communicate . . . as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except (ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for the other parties. . . ; (iii) orally, upon adequate notice to counsel for the other parties. . . ."[9]

The purpose of these procedures, as stated in the rule, is to "maintain and preserve the impartiality of tribunals. . . ."[10] Nelson Management stalled answering HTTA's complaint for five months. Then, in a letter dated November 13, 2008, counsel for Nelson Management communicated with DPS, to provide "information and explanations regarding certain allegations made by the Public Utility Law Project of New York ("PULP") on behalf of Hazel Towers Tenants Association ("HTTA" or "Association") regarding the submetering of electricity at the above properties."[11] The November 13, 2008 communication attached a proposed lease rider as Exhibit I, which Nelson Management described as "including all the required language." Nelson Management further represented that the proposed lease rider would be attached to all new leases and lease renewals. Counsel for HTTA did not receive a contemporaneous copy of that communication from the submeterer's counsel, in violation of 22 NYCRR § 1200.27, and OCS did not provide it to HTTA counsel or require Nelson Management to provide it. This deprived HTTA of any opportunity to identify shortcomings of the proposed lease

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body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

9 22 NYCRR § 1200.27.

10 *Id.*

11 *See*, Letter from Joseph Amicone, Esq. to Deborah Sippel, November 3, 2008, in Case No. 814524.

rider or to point out that Nelson Management had not actually entered into lease rider agreements with tenants, contrary to the Commission's Submetering Order.

The ID attached a proposed lease rider (as Exhibit B) that was different from the proposed lease rider attached as Exhibit I to the November 13, 2008 *ex parte* communication. Apparently, there were further oral communications between counsel for Nelson Management and DPS which were not conducted "upon adequate notice to counsel for the other parties" in violation of 22 NYCRR § 1200.27. Accordingly, the ID findings regarding terms and conditions of lease rider requirements were tainted by improper *ex parte* contacts.

(v) Method of rate calculation

The ID erred in approving a proposed lease rider that does not incorporate "the method of rate calculation" into submetered tenants' lease agreements, which is a clear requirement of the Submetering Order which says: "The method of rate calculation, rate cap, complaint procedures, tenant protections, and the enforcement mechanism will be incorporated in plain language in all leases governing submetered apartments." The proposed lease rider appended to the ID as Exhibit B contains this language:

"The bills you receive show the amount of kilowatts you used. You will receive a monthly bill indicating the price charged per kilowatt. You will be charged at the rate paid by Parker Towers, which is the 'Bulk' rate, such rate not to exceed the Con Edison rate for direct metering. There will also be a monthly surcharge for billing."

The above-quoted language does not establish a rate or inform tenants of the method of rate calculation and violates a condition of the Submetering Order.[12]

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[12] The above-quoted lease rider language also fosters ignorance and misunderstanding of basic electricity principles by confusing "kilowatts" with "kilowatt hours."

(vi) Lack of tenant protection

The ID erred in approving a proposed lease rider that does not incorporate "tenant protections" into submetered tenants' lease agreements, which is a requirement of the Submetering Order. The proposed lease rider appended to the ID as Exhibit B contains this language:

"If you are having difficulty paying your bill, please contact us by telephone or by letter in order to arrange for a deferred payment agreement whereby you can pay the balance owed over a period of time. If you can show financial need, we can work with you to determine the length of the agreement and the amount of each monthly payment. You may not have to make a down payment and installment payments may be as little as $50 per month."

- The above-quoted language from the proposed lease rider does not provide a valid "tenant protection" because it does not conform to the Commission's HEFPA implementing regulations, specifically 16 NYCRR § 11.10(a)(iii), which provides "a payment agreement must provide for installments as low as $10 per month and no down payment, when the customer or applicant demonstrates financial need for such terms. . . ."
- The above-quoted language erroneously informs tenants that the lowest installment payment amount is $50 per month, and therefore does not incorporate adequate "tenant protections" into submetered tenants' leases, and violates a condition of the Submetering Order. Furthermore, an agreement by the parties that the minimum DPA payment is $50 per month would be unenforceable because New York law permits a minimum payment of $10. "It is the settled law of this State (and probably

of every other State) that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object. . . ."[13]

(vii) Service termination in violation of the Commission's Submetering Order

The ID erred in approving a proposed lease rider that contains references to termination of electric service, when the Submetering Order does not permit termination. The proposed lease rider appended to the ID as Exhibit B contains this language:

"Regardless of your payment history with us, we will continue electric service if your health or safety is threatened. . . Under no circumstances will your service be shut off without you receiving a Final Termination/Disconnection Notice which will be sent at lease [sic] 20 days after payment was due and will set a termination/disconnection date at lease [sic] 15 days from the date the Notice is sent. . . . In the event your service is shut off. . . ."

- The Submetering Order clearly states: "The application provides that the electricity shutdown in any apartment will only be done to accommodate a repair or building emergency requirement and be for a temporary duration. In no case will electricity be shut down in an apartment for a failure to pay for electricity." (Submetering Order at p. 3).

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 1 (a) as follows:

(i) a decision directing Nelson Management to halt all submetering due to the failure to bear its burden of proof to show it has obtained tenant consent to

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[13] *Stone v. Freeman*, 298 N.Y. 268, 271 (1948).

approved service agreements, and the failure to comply with the Commission's Submetering Order;

(ii) a decision directing Nelson Management to revise its complaint procedures for HEFPA compliance;

(iii) a decision directing Nelson Management to implement revised, HEFPA-compliant complaint procedures not less than 30 days from the date the revised procedures are filed with the Commission, in accordance with 16 NYCRR § 11.20;

(iv) a decision directing Nelson Management to incorporate "the method of rate calculation" into submetered tenants' lease agreements;

(v) a decision directing Nelson Management to incorporate "tenant protections" into submetered tenants' lease agreements, including accurate information regarding minimum payments for DPAs;

(vi) a recommendation to the Commission that commencing immediately, DPS attorneys and attorneys practicing before the Commission adhere to the New York Rules of Professional Conduct, 22 NYCRR § 1200, *et seq.*, in OCS complaint proceedings to maintain and preserve the impartiality of the PSC and the DPS.

(vii) a decision directing Nelson Management to remove all direct and implied references to termination of electric service from submetered tenants' lease agreements, inasmuch as the Submetering Order does not permit termination of electric service.

b. The ID erroneously permits submetered customers to be billed for electric service without the prerequisite compliance with the Submetering Order

In the absence of a filed and Commission-approved tariff for landlord-provided electric service at Hazel Towers, and the existence of the Con Edison tariff prohibition against any resale of electricity unless authorized by a Commission order, the Submetering Order creates a contract-for-service regime (rather than a filed tariff system) and requires that "the method of rate calculation, rate cap, complaint procedures, tenant protections, and the enforcement mechanism will be incorporated in plain language in all leases governing submetered apartments." (Submetering Order at p. 4) The ID confirms

that the required language was never incorporated into the leases. Nelson Management failed to meet its burden to prove it obtained tenant consent to valid service agreements.

The ID erred (i) by allowing Nelson Management to demand and retain tenants' payments for submetered electric service in the absence of a valid lease rider establishing the rates, terms and conditions of electric service approved by the Commission; and (ii) by permitting Nelson Management to continue billing for submetered electric service without proof of signed, valid lease riders establishing the rates, terms and conditions of electric service approved by the Commission.

The unsigned, proposed lease rider appended to the ID as Exhibit B does not in any way establish the essential rates, terms and conditions for submetered electric service, which is a condition of the Commission Submetering Order. The proposed lease rider's "take it or leave it" boilerplate language cannot establish knowing and informed tenant assent to charges that cannot be ascertained in advance of their imposition.[14] In the absence of any viable agreement for electric service, without proof of knowing tenant consent, and without full compliance with the Submetering Order, Nelson Management and its agents are not authorized to resell electric service to Hazel Towers tenants.

Furthermore, if the rates, terms and conditions of electric service are not approved by the Commission, charges are unlawful[15] and Nelson Management may not enforce a

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[14] *See, e.g.*, In the Matter of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B, Decision and Order, August 13, 2009 at p. 18, *et. seq.*, setting forth the constituent elements of informed consent for submetering in residential apartments, *available at* http://www.rds.oeb.gov.on.ca/webdrawer/webdrawer.dll/webdrawer/rec/145897/view/dec_order_Smart%20SubMeters_20090813.PDF

[15] PSL § 65.

claim for *any* compensation in any court.[16] The ID thus erred by failing to order a refund of all amounts paid by tenants for unlawfully submetered electric service conducted in violation of the Submetering Order, and again erred by permitting submetered billing to continue in the absence of valid, signed service agreements.

The lease of a submeterer is its contract or tariff for electric service, the terms and conditions of which must be approved by the Commission. The time for lawful submetered electricity charges to begin, as authorized by the Commission's Submetering Order, is triggered by the utility's subsequent compliance with the conditions of that order.[17] Inasmuch as Nelson Management did not implement leases containing the rates, terms and conditions of electric service, and still has not done so, such terms cannot have been approved by the Commission and are therefore unlawful under Public Service Law § 65.[18]

The following facts are undisputed:

1. There is no filed tariff for landlord-provided electric service at Hazel Towers.
2. The filed tariff of Con Edison, the local distribution utility, prohibits any resale of electricity unless authorized by a Commission order.[19]
3. The Submetering Order issued in Case 00-E-1269 specifically created a contract-for-service regime (rather than a filed tariff system) requiring that "The method of rate calculation, rate cap, complaint procedures, tenant protections, and the enforcement

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16 PSL § 75.

17 *See Electrical District No. 1 v.* FERC, 774 F.2d 490, 492-493 (D.C. Cir. 1984) (charges authorized by Commission order began not with the date of the order but with the compliance filing of new rates consistent with the order).

18 PSL § 65(5).

19 16 NYCRR § 96.1; *Campo v. Feinberg*, 303 N.Y. 995 (1952).

mechanism, will be incorporated in plain language in all leases governing submetered apartments."[20]

4. The ID confirmed that as of August 21, 2009, Nelson Management did not provide tenants with a lease rider containing the Commission-ordered language sufficient to establish valid agreements for electric service when it began submetering in April 2007.[21]

5. The ID confirmed that as of August 21, 2009, a proposed lease rider was still in the process of "being attached to each tenant's lease upon renewal."[22]

6. A proposed lease rider containing the essential terms and conditions for submetered electric service was never filed or approved by order of the Commission in Case 00-E-1269.[23]

7. The Submetering Order provides: "The electricity charges and concurrent rent reductions will go into effect for each such apartment upon the expiration of the current apartment lease."[24] Nelson Management did not phase in billing for submetering upon lease expiration and entry into new, valid electric service agreements but rather, "verified that all rent reductions were applied the first month the submetering began."[25]

8. Many of the terms of the proposed lease rider Nelson Management was still implementing as of August 21, 2009 (appended to the ID as Exhibit B) are contrary to HEFPA and the Submetering Order.[26]

HTTA has argued that Nelson Management's failure to establish the essential terms and conditions of electric service in valid agreements with submetered customers merits a refund to customers of all amounts paid for electric service. Nelson

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20 Submetering Order at p. 4.

21 *See*, ID at p. 5, "It does not appear that this rider was attached to the leases prior to the commencement of submetering in April 2007. . . ." and ID at p. 1, "Nelson Management originally advised Staff that it was in the process of including the required language in each tenant's Lease as it is renewed. However, Nelson Management renewed some tenant's leases in 2007 (2 year and 1 year leases) and also additional leases in 2008 (1 year and 2 year leases) prior to the adoption of the revised Lease Rider."

22 ID Issue 1, pg. 1.

23 Petition of Herbert E. Hirschfeld, P.E., to submeter electricity at Hazel Towers, July 25, 2000.

24 Submetering Order at p. 3.

25 ID Issue 10 at p. 5.

26 *See*, HTTA's response herein to ID Issue 1.

Management has countered that a full refund of all amounts paid by tenants for submetered electricity would "result in unjust enrichment."[27] The ID concluded, without rationale or citation, "We find no basis to order a complete refund of all billed submetering charge."[28]

(i) The application of PSL § 65

At issue in this circumstance, is whether Public Service Law § 65 is applicable to Nelson Management. PSL § 65(5) provides:

> "Nothing in this chapter shall be taken to prohibit a gas corporation or electrical corporation from establishing classifications of service based upon the quantity used, the time when used, the purpose for which used, the duration of use or upon any other reasonable consideration, and providing schedules of just and reasonable graduated rates applicable thereto. *No such classification, schedule, rate or charge shall be lawful unless it shall be filed with and approved by the commission, and every such classification, rate or charge shall be subject to change, alteration and modification by the commission.*" (emphasis added).

Inasmuch as OCS failed to order refunds to tenants under the above-listed facts, it apparently concluded, without so stating, that Section 65 of the Public Service Law does not apply to Nelson Management. HTTA submits that OCS erred in this conclusion.

The Commission uses a "realistic appraisal" to "ascertain the Public Service Law requirements that should be imposed on new forms of electric service providers that differ in character from traditional electric utility monopoly providers."[29] Under this

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27 ID Issue 4 at p. 2.

28 *Id.*

29 *Order Providing for Lightened Regulation*, Carr Street Generating Station, L.P., Case 98-E-1670, (Issued and Effective April 23, 1999), at p. 7.

approach, the Commission must first determine "whether a particular section of the Public Service Law is inapplicable on its face."[30]

Using the first step in the Commission's analysis, if § 65 was inapplicable on its face to submeterers, submeterers would not be required to obtain authorization to submeter in a Commission Order, which specifically sets forth what the rates and charges for submetered electric service will be. Because the Commission requires submeterers to obtain authorization to submeter under 16 NYCRR Part 96, it must be concluded that the Commission intends to exercise jurisdiction over submeterers and if that is so, it follows that submeterers' service classifications, rates and charges are subject to filing with and approval by the Commission under § 65. Indeed, the statutory authority cited for 16 NYCRR § 96.1 is Public Service Law §§ 65 and 66.

"If the provision is applicable, the next analysis is to determine if it is possible for an entity to comply with its requirements of a provision [sic]."[31] It was possible for Nelson Management to comply with a requirement that it file with and have its rates approved by the Commission. The required filing would have been a lease rider setting forth the terms and conditions of electric service at Hazel Towers, a condition of the Submetering Order. Although Nelson Management obtained the order in January 2001, it has offered no explanation for why it has not complied with the simple lease modification imposed by the Commission as a condition of submetering. HTTA can suggest no reason why Nelson Management did not comply with this particular mandate in the Submetering Order, nor did the ID illuminate any barriers to Nelson Management's performance.

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30 *Id.*

31 *Id.*

Accordingly, it is reasonable to conclude that it is not only possible for Nelson Management to comply with the provisions of § 65, but indeed it was ordered to do so by the Commission as a condition of submetering, indicating that the Commission believed it was possible for Nelson Management to comply.

Finally, "even if an entity could theoretically comply with a statutory provision, a realistic appraisal requires an analysis of whether imposing the requirement is necessary to protect the public interest, or would instead adversely affect the public."[32] The Commission ordered Nelson Management to provide certain submetering notification language and protections in tenants' leases, presumably because it believed such action to be in the public interest. The assessment of whether the public interest is served by compliance with the Commission's Submetering Order is perhaps best determined by asking the converse: Would submetered customers benefit if the method of rate calculation, rate cap, complaint procedures, tenant protections, and the enforcement mechanism was concealed from them? Would submetered customers benefit by their landlord's unilateral alteration of the terms of their leases, before the terms of those leases expired, and the imposition of charges for submetered electric service contrary to an order of the Public Service Commission? Would the Commission benefit from ignorance of unlawful terms and conditions of electric service at Hazel Towers?

The Commission has previously ruled that "allowing uncertified and untariffed companies to provide telephone service in New York may harm customers and other

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32 *Carr Street Generating Station* at p. 8.

certified companies."[33] By comparison, a submeterer is "certified" by the Commission to operate by virtue of the Submetering Order. Its tariff is its lease provision for electric service, which the Commission requires contain specific language on the rates, terms and conditions of electric service. Nelson Management has violated the submetering order and its failure to implement lease electric service provisions essentially leaves it operating "untariffed."[34] As the Commission stated in *New York Telephone*:

> Through certification, and the threat of its withdrawal, the Commission retains influence over a telephone company's operation and treatment of customers. Therefore, the public safety and welfare would be impaired by delaying this rulemaking for the normal time period required by the State Administrative Procedure Act.[35]

If the Commission believed in *New York Telephone* that the terms and conditions of a utility's operation and its treatment of customers is important enough to retain influence over – and that public safety and welfare would be impaired by the length of a SAPA comment period – the last prong of the "realistic appraisal," protection of the public interest, must be satisfied. Moreover, Nelson Management has been operating in flagrant violation of the Submetering Order for more than two years – since April 2007 – without valid, signed agreements for electric service. During this time, by its own calculation in this case, it recognized that it has overcharged its customers for electricity by at least $20,000, imposed excessive late fees upon them, and threatened them with

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33 *Recommended Decision*, In the Matter of New York Telephone Company, Case 97-C-1054, (Approved as Recommended and so Ordered by the Commission June 25, 1997), at p. 3.

34 "The tariff is a quasi-contract between the utility and its customers that is imposed by operation of a law as a condition of utility service." *Recommended Decision*, Proceeding on Motion of the Commission as to the Rules and Regulations of Jamaica Water Supply Co., Case 29688 (February 26, 1987).

35 *Id.*

termination of service. Surely these acts over a two year period satisfy the "public interest" prong of the "realistic appraisal" test. All prongs being satisfied thereby leads to the conclusion that § 65 is applicable to Nelson Management.

(ii) Contractual protections

The Commission has consistently protected consumers entering into contracts with traditional utilities and alternative service providers. We see no reason why the Commission would depart from those protections here. For example, the Commission recently revamped the marketing practices of Energy Service Companies ("ESCOS") and in doing so, clearly defined the terms of a "sales agreement" and further required verification of the customer's actual entry into that agreement:

> Sales agreement -- An agreement between a customer and an ESCO that contains the terms and conditions governing the supply of electricity and/or natural gas provided by an ESCO. The agreement may be a written contract signed by the customer or a statement supporting a customer's verifiable verbal or electronic authorization to enter into an agreement with the ESCO for the services specified.[36]

Nelson Management has in essence "slammed" its tenants into electric service without valid, signed service agreements, and it was rewarded for its contumacy by OCS, when OCS did not stop the unlawful submetering bills.[37]

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[36] *Order Adopting Amendments To The Uniform Business Practices, Granting In Part Petition On Behalf Of Customers And Rejecting National Fuel Gas Distribution Corporation's Tariff Filing*, In the Matter of Retail Access Business Rules Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies, Cases 98-M-1343; 07-M-1514; 08-G-0078, Appendix B, (Issued and Effective October 27, 2008).

[37] Recently, the Ontario Electricity Board issued a Decision and Order requiring individual tenant knowing consent to submetering, and held all existing arrangements to be null and void. *In the Matter of the Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B; and *In the Matter of an order or orders authorizing certain distributors to conduct specific discretionary metering activities under section 53.18 of the Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A., August 13, 2009, pp. 16-19.

The Commission also requires that deferred payment agreements ("DPAs") be written and signed by both the utility and the customer, and this protection is written into the Public Service Law and Commission regulations.[38] Unlike Nelson Management's submetered customers, utility customers entering into DPAs have already received far more information regarding the terms and conditions of the electric service they are purchasing, because upon initiation of service to residential customers, the distribution utility must, by law, provide each customer with "notice which summarizes the rights and obligations of residential customers relating to the rendition of service."[39] These contractual protections that the Commission consistently provides for ESCO and distribution utility customers (who both can shop for electricity with the distribution utility or with any ESCO operating in their territory) should not be diluted for the captive customers of a submetering landlord that has consistently violated Commission-mandated consumer protections.

(iii) Quasi-contracts and unjust enrichment

A utility has "a responsibility to provide clear and accurate answers about its tariff and . . . this responsibility is not lessened, even for sophisticated [customers].[40] In *Glens Falls Communications*, Complainant Glens Falls Communications asked for an award of interest on overpayments it had made to New York Telephone, on grounds that "to find otherwise would be to confer unjust enrichment upon NYT and reward its unacceptable

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38 PSL § 37, 16 NYCRR § 11.10(a).

39 PSL § 44(3).

40 *Commission Determination - Appeal by Glens Falls Communications Corporation of the Informal Decision Rendered in Favor of New York Telephone Company in C 26358 (461339)*, In the matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures, Case No. 94-C-0894, (Issued and Effective August 9, 1995), at p. 32.

conduct."[41] The Commission ordered New York Telephone to refund monies to a sophisticated commercial customer because its tariff was ambiguous and it failed to properly respond to the customer's billing inquiry.[42] HTTA asks for nondiscriminatory treatment in the face of these precedents.

Nelson Management has argued that despite the fact that there is no legally cognizable contract for electric service between itself and Hazel Towers tenants, refunds of the unlawful charges for electric service should not be ordered, because tenants would be "unjustly enriched." The Commission has previously ruled that if there is no express contractual liability for service, a customer:

> can only be liable for the service if we conclude that she had an implied (or quasi or constructive) contract for service. . . . This depends on whether she benefited from the service provided by the utility, and whether she will be unjustly enriched if the benefit is left uncompensated."[43]

Here, Hazel Towers tenants did not benefit from submetered electric service. It was foisted upon them without lawful notice and without contract, and it was accompanied by flagrant violations of HEFPA, more than $20,000 in now conceded overcharges for service,[44] and even an attempt to obtain a court order to enter into the apartment of an elderly resident to disconnect her service for nonpayment.[45] Submetered

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41 *Id.* at pp. 13-14.

42 *Id.* at p. 34.

43 *Commission Determination - Appeal by Ms. Ruth Cunningham Morris of the Informal Decision Rendered in Favor of the Brooklyn Union Gas Company, filed in C 26358*, In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, In relation to Complaint Procedures, Case 97-G-1308, (Issued and Effective October 4, 2000), at p. 10.

44 See generally, Initial Decision, August 21, 2009.

45 *See* OCS Complaint No. 808212.

electric service at Hazel Towers came without actual rent reductions. Nelson Management never lowered the contract rent of any tenant, but merely issued a monthly "credit," instead of the DHCR-ordered rent reductions, which did not come close to meeting the monthly costs for electricity charged by Nelson Management. Thus the tenants were not "unjustly enriched" by submetered electric service. Instead, their costs in many cases were triple or even quadruple the "credit" they received; they were threatened with adverse consequences for nonpayment; overcharged, and not advised of their rights and consumer protections under the law.

A contract implied in law is an obligation imposed by law to do justice, even though it is clear that no promise was ever made or intended.[46] However, any losses sustained by Nelson Management occasioned by refunds to tenants should not be artificially labeled "benefits" to tenants. The New York Court of Appeals has clearly spoken to this issue:

> The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent.[47]

Here, the "benefit" of electric service was conferred upon Hazel Towers tenants under "mistake of law," inasmuch as Nelson Management's implementation of submetering has been shown to have violated the conditions set in the Submetering

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46 *Bradkin v. Leverton*, 26 N.Y.2d 192 (1970).

47 *Paramount Film Distrib. Corp. v. State*, 30 N.Y.2d 415, 421 (1972) (internal citations omitted).

Order, the Public Service Law and Commission regulations. It cannot be said that the Hazel Towers tenants tortiously or fraudulently obtained electric service. Indeed, they had no choice but to use Nelson Management's electricity – it was forced upon them. In fact, the Commission has also recognized, in a case involving a captive tenant with no control over the electricity supply,[48] "The fact that, as a result, the tenant does not pay for his own electric use does not equate to unjust enrichment."[49] Each and every act of Nelson Management and its agents in forcing Hazel Towers tenants to use submetered electricity was voluntary and conducted with Nelson Management's full knowledge.

To prevail on a claim of unjust enrichment, Nelson Management must show (a) Hazel Towers tenants were enriched; (b) at Nelson Management's expense; and (c) that it is contrary to equity and good conscience to refund tenants the amounts they have paid for electric service.[50] "Notably, it is the plaintiff's burden to 'demonstrate that services were performed *for the defendant* resulting in its unjust enrichment."[51] Here, submetering cannot be said to have been performed "for the tenants." Tenants did not participate in the decision to submeterer and they did not benefit from it. Even if they had benefited from submetering, "the mere fact that the plaintiff's activities bestowed a benefit on the defendant is insufficient to establish a cause of action for unjust

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48 The ruling was made in a shared meter context.

49 *Commission Determination on Rehearing Petition by Mr. Garth Harding of the Designee's Determination in Favor of Mr. Moses Fried and Consolidated Edison Company of New York, Inc., filed in C 26358 (410891)*, In the Matter of a Commission Designee's Determination Pursuant to PSL Section 52, Case No. 04-E-0608, (Issued and Effective November 22, 2004) at p. 6-7.

50 *Clark v. Daby*, 300 A.D.2d 732, 732 (3d Dep't 2002).

51 *Kagan v. K-Tel Entertainment, Inc.*, 172 A.D.2d 375, 376 (1st Dep't 1991) (emphasis in original).

enrichment."[52] The court must look to whether the plaintiff is actually entitled to compensation for any benefits.[53] Nelson Management is not entitled to retain monies paid by tenants for electric service when that electric service was provided in violation of the Commission's Submetering Order and regulations and the Public Service Law, and resulted in financial hardship to tenants. Inasmuch as Nelson Management never actually reduced contract rents as ordered by DHCR, but merely issued monthly credits, the parties can easily be restored to the status quo by reversing the tenants' monthly rent credits and refunding the difference that they paid in unlawful electric service charges.

Accordingly, any decision by OCS or the Commission that Nelson Management is entitled to retain the amounts paid by Hazel Towers tenants for unlawfully submetered electricity with no valid service agreements in place contravenes black letter contract law and is not likely to be upheld by New York courts. The viability of Nelson Management's potential restitution claim, however, is not a matter for the Commission to decide. The Commission must enforce its orders, and cannot permit Nelson Management to collect money from a population of captive customers without valid, signed contracts, particularly when Nelson Management was specifically ordered by the Commission to establish those contracts before charging tenants for any electric service.

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the

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52 *Clark, supra*, citing *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 120 (1st Dep.t 1998).

53 *Weiner, supra* at 241 A.D.2d 121.

OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 1 (b) as follows:

(i) a decision directing Nelson Management to refund to tenants all amounts paid for submetered electric service since submetering commenced, on grounds that no valid electric service agreement or lease rider establishing the rates, terms and conditions of electric service approved by the Commission was ever entered into, in violation of the Submetering Order, which clearly contemplated that such agreements would exist prior to charging any tenants for any electricity; and

(ii) a decision prohibiting Nelson Management from billing tenants for submetered electric service until a valid electric service agreement or lease rider is implemented upon the future expiration and renewal of tenants' leases, as specifically provided in the Submetering Order.

ID Issue 2 Billing invoices did not indicate (a) the charge for electric supplied and the identity of the supplier; (b) delivery charges; (c) taxes and surcharges; (d) administrative charges for meter reading and billing; and (e) the language in the invoice is not clear and understandable.

The billing format has been revised as reported in the Initial Decision. However, Hazel Towers tenants are entitled to receive messages and notices on their bills in English, and neither the Notification of Rights (Exhibit F to the Initial Decision) nor the monthly electric service invoices inform tenants of this HEFPA right, in violation of Public Service Law § 44(4).

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 2 as follows:

(i) a decision enforcing the Submetering Order by directing Nelson Management to offer its submetered customers to receive messages on

bills and notices in English and another language, in accordance with PSL § 44(4).

ID Issue 3 Tenants were not provided information regarding the method of rate calculation, rate cap, complaint handling procedures, tenant protections and enforcement mechanisms.

a. The ID erred in its determination regarding rate calculation method

The ID erred in making the following determination: "Rate calculation methods were addressed in a June 25, 2007 'Q&A' memo to the residents of Hazel Towers. (Exhibit D)"

The Commission ordered rate calculation methods to be "incorporated in plain language in all leases governing submetered apartments." (Submetering Order p. 4). As noted above in ID Issue 1(b), the Submetering Order creates a contract-for-service rather than a filed tariff regime for resale of electric service to tenants. Nelson Management's "Q&A memo" does not establish valid electric service contracts with tenants. In the absence of valid contracts for service, tenants are entitled to refunds of all amounts they have paid for electric service.

The Commission's intent that Nelson Management create valid contracts with tenants containing the terms it mandated (including method of rate calculation) is made abundantly clear in the Submetering Order: "The electricity charges . . . will go into effect for each [rent stabilized] unit upon the expiration of the current apartment lease." (Submetering Order at p. 3). Tenant leases expired, but Nelson Management did not incorporate the required language into the renewal leases, in violation of the Submetering Order.

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 3(a) as follows:

(i) a decision directing Nelson Management to refund to tenants all amounts paid for submetered electric service since submetering commenced, on grounds that no valid electric service agreement or lease rider establishing the rates, terms and conditions of electric service approved by the Commission was ever entered into, in violation of the Submetering Order; and

(ii) a decision prohibiting Nelson Management from billing tenants for submetered electric service until a valid electric service agreement or lease rider is implemented upon the future expiration and renewal of tenants' leases, as specifically provided in the Submetering Order.

(iii) a decision requiring Nelson Management to prove that it has obtained tenant consent to submetering by producing a copy of each tenant's signed lease rider/service agreement containing rates, terms and conditions of electric service at Hazel Towers filed with and approved by the Commission.

b. The ID erred in only making "spot checks" for rate cap violations.

The ID erred in concluding under ID Issue 3that a "spot check" can "assure that the tenants were billed the correct rate." As evidenced by OCS' finding that Nelson Management overbilled tenants by more than $20,000, full audits, not spot checks, are appropriate. Information filed in other cases pending before the Commission demonstrates that the Con Edison Service Class 8 (SC-8) rate *can* and *has* exceeded the Con Edison SC-1 rate cap.[54]

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[54] *See, Comments of Starrett Corporation*, In the Matter of Reviewing and Amending the Electric Submetering Regulations, 16 NYCRR Part 96, Case 08-M-1274, filed February 26, 2009.

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 3(b) as follows:

(i) a decision requiring Nelson Management to provide the SC-1 rate on all of its monthly bills to submetered customers so that they may check compliance with the rate cap, particularly as a protection for times when the SC-8 rate exceeds the SC-1 rate;

(ii) a full audit of all rates charged to tenants at Hazel Towers from the commencement of submetering to date, and an order directing Nelson Management to refund all overcharges.

c. *The ID erred in approving a defective, proposed Notification of Rights and Procedures*

The ID erred in approving Nelson Management's "Notification of Rights and Procedures" (attached to the ID as Exhibit F) as adequate to provide tenants with the method of rate calculation, rate cap, complaint handling procedures, tenant protections and enforcement mechanism."

- The Notification contains the same faults as the proposed lease rider,[55] it is *completely silent* on any method of rate calculation, and it impliedly states that electric service can be shut down for any reason other than a threat to health and safety.

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[55] Although it does at least state that minimum DPA payments can be as low as $10 per month, whereas the lease rider sets the minimum payment at $50.

- The Notification does not inform tenants of their right to receive the Notification or messages on their bills in both English and another language, as required by PSL § 44(4).

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 3(c) as follows:

(i) a decision directing Nelson Management to revise its complaint procedures for HEFPA compliance;

(ii) a decision directing Nelson Management to implement revised, HEFPA-compliant complaint procedures not less than 30 days from the date the revised procedures are filed with the Commission, in accordance with 16 NYCRR § 11.20;

(iii) a decision directing Nelson Management to incorporate "the method of rate calculation" into submetered tenants' annual Notification;

(iv) a decision directing Nelson Management to incorporate "tenant protections" into the annual Notification,;

(v) a decision directing Nelson Management to remove all direct and implied references to termination of electric service from the Notification, inasmuch as the Submetering Order does not permit termination of electric service.

ID Issue 4 PULP requested a full accounting of all charges billed to tenants for electric service and a full refund for all tenants on billed and paid charges, or at least a refund on all overcharges of electric bills by submeterer.

The ID erred in refusing to order a refund of all electric charges paid by tenants, in view of the fact that Nelson Management did not and still has not met its burden of

proof to show that it established valid agreements to provide electric service to submetered customers at Hazel Towers.

The ID erred in permitting "Nelson Management review every tenant's billed electric charges and provide Staff with a billing history *for every month where tenants were billed in excess of the direct metered rate for Con Edison.*"

- A full accounting was never conducted by OCS, nor did OCS ever receive a full billing history for each tenant from the commencement of submetering. HTTA's complaint has therefore not been fully investigated.
- Nelson Management has disclosed only some incidents where its charges were concededly higher than Con Edison's SC-1 charges for similar usage. It has not identified situations where its charges to tenants exceeded its costs for electricity but were nonetheless at or below Con Edison rates.
- OCS erred in relying on Nelson Management to report billing histories for only 9 monthly statements over the 28-month period from the commencement of submetering until the ID was issued in August 2009. HTTA members should not be placed in the position of relying on the good faith of Nelson Management to report overcharges, when it has repeatedly been shown to have flagrantly violated the Submetering Order, Commission regulations and the Public Service Law. HTTA requested and is entitled to a full, impartial investigation by OCS.
- OCS erred in failing to set a date certain for timely issuance of credits to tenants accounts, but merely stated that credits would be issued "in the near

future." It has now been more than eight weeks since the ID was issued, and HTTA members have not received any credits.

- OCS erred in failing to determine the disposition of credits due to individuals who are no longer residing at Hazel Towers.

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 4 as follows:

(i) a decision directing Nelson Management to refund to tenants all amounts paid for submetered electric service since submetering commenced, on grounds that Nelson Management failed to meet its burden to show that a valid lease rider establishing the rates, terms and conditions of electric service approved by the Commission was ever entered into by Hazel Towers tenants, in violation of the Submetering Order; and

(ii) a decision prohibiting Nelson Management from billing tenants for submetered electric service until a valid lease rider is implemented upon the future expiration and renewal of tenants' leases, as specifically provided in the Submetering Order.

(iii) a decision ordering Nelson Management to provide OCS with a full audit of billing history for all submetered accounts at Hazel Towers from the inception of submetering in April 2007 through the date of the ID in August 2009, and to refund to tenants, by a date certain, all amounts overcharged for electric service in that period;

(iv) a decision ordering Nelson Management to identify tenants overcharged who are no longer tenants at Hazel Towers, the amounts they are owed, and the disposition of the refunds that those tenants are due.

ID Issue 5 Nelson Management charged a late payment fee of $25 instead of the 1.5% per month provided by Con Edison's tariff.

The ID erred in failing to conduct a full audit of Nelson Management's charges for electric service to all submetered customers at Hazel Towers. Instead, OCS permitted "Nelson Management [to] review every tenant's billed electric charges and provide Staff with a billing history *for every month where tenants were billed in excess of the direct metered rate for Con Edison.*" Accordingly:

- A full accounting was never conducted by OCS, nor did OCS ever receive a full billing history for each tenant from the commencement of submetering. HTTA's complaint, including its complaint of $25 late charges, has not been fully investigated.
- Nelson Management bears the burden of proof on all issues.[56] Complainants showed unlawful policies to assess $25 late charges. OCS then relied on Nelson Management and its agent's reports of removal of $25 late charges. Furthermore, OCS reviewed only 9 monthly statements out of the 28-month period from the commencement of submetering until the ID was issued in August 2009. HTTA members should not be placed in the position of relying on the good faith of Nelson Management to report overcharges, when it has repeatedly been shown to have flagrantly disregarded and violated the Submetering Order, Commission regulations and the Public Service Law. HTTA requested and is entitled to a full, impartial investigation by OCS.

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[56] PSL § 43.2(b).

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 5 as follows:

(i) a decision ordering Nelson Management to provide OCS with a full audit of billing history for all submetered accounts at Hazel Towers from the inception of submetering in April 2007 through the date of the ID in August 2009, and to refund to tenants, by a date certain, all amounts overcharged in late payment fees during that period;

(ii) a decision ordering Nelson Management to identify tenants who were overcharged $25 late fees but who are no longer tenants at Hazel Towers, the amounts they are owed, and the disposition of the refunds that those tenants are due.

ID Issue 6 Nelson Management's termination procedures are not in compliance with the Home Energy Fair Practices Act.

The ID erred in its assessment that "any language in submetering documentation has therefore been removed."[57] As previously noted, the ID approved a newly proposed and unimplemented lease rider that contains references to termination of electric service, when the Submetering Order does not permit termination. The proposed lease rider appended to the ID as Exhibit B contains this language:

"Regardless of your payment history with us, we will continue electric service if your health or safety is threatened. . . Under no circumstances will your service be shut off without you receiving a Final Termination/Disconnection Notice which will be sent at lease [sic] 20 days after payment was due and will set a termination/disconnection date at lease [sic] 15 days from the date the Notice is sent. . . . In the event your service is shut off. . . ."

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57 ID Issue 6 at p. 3.

- The Submetering Order clearly states: "The application provides that the electricity shutdown in any apartment will only be done to accommodate a repair or building emergency requirement and be for a temporary duration. In no case will electricity be shut down in an apartment for a failure to pay for electricity." (Submetering Order at p. 3).

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 6 as follows:

(i) a decision directing Nelson Management to revise its complaint procedures for HEFPA compliance;

(ii) a decision directing Nelson Management to implement revised, HEFPA-compliant complaint procedures not less than 30 days from the date the revised procedures are filed with the Commission, in accordance with 16 NYCRR § 11.20;

(iii) a decision directing Nelson Management to remove all direct and implied references to termination of electric service from submetered tenants' lease agreements, inasmuch as the Submetering Order does not permit termination of electric service.

ID Issue 7 PULP states that Nelson Management failed to provide the low-income rate to eligible tenants. PULP maintains that by not affording tenants this reduction, Nelson Management is charging tenants an amount that exceeds the Con Edison's [sic] direct metered rate.

The ID erred in concluding that Nelson Management did not violate the Submetering Order's rate cap by charging full service rates to submetered customers who were eligible for the low income rate. To arrive at this remarkable conclusion, the ID

reasoned that "Con Edison requires customers to be proactive and apply for the program . . . Nelson Management received no request from any tenant . . . and Nelson Management is unable to blindly determine eligibility for this benefit."[58] In the same paragraph, the ID acknowledges that Nelson Management never notified its customers of the availability of the low-income rate. The ID's conclusion contravenes the Commission's stated position on this issue:

> 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 the decision *after it has been notified that such options are available.*[59]

HTTA submits that OCS cannot allow Nelson Management to violate the Submetering Order by neglecting to provide an adequate annual notification to tenants that advises them of the low income rate, while simultaneously permitting Nelson Management to pocket the low-income discount that the neediest of its tenants would have received had they been adequately notified. The failure to notify tenants was a violation of the Public Service Law,[60] Commission regulations, the Submetering Order and Commission precedent. Yet in the ID, OCS allows Nelson Management to walk away – its pockets lined with low-income tenants' discounts – with OCS' advice that "it would need to incorporate the notification of low-income tenant billing. . . ."

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58 ID, Issue 7, at pp. 3-4.

59 *Opinion and Order Directing Rebilling*, In the Matter of the Dispute Between Bronxwood Home for the Aged, Inc. and Consolidated Edison Company of New York, Inc., filed in Case 26358, Case 90-E-0996, Opinion No. 92-9 (Issued and Effective April 16, 1992), at p. 11 (emphasis added).

60 PSL § 44(3).

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 7 as follows:

(i) a decision directing Nelson Management to immediately notify all tenants of the availability of a low income rate;

(ii) a decision directing Nelson Management to credit the low income rate back to April 2007 when submetering commenced, to tenants who have now applied for the low income rate, or who will apply for the rate between now and December 31, 2009;

(iii) a recommendation to the Commission that commencing immediately, DPS attorneys and attorneys practicing before the Commission adhere to the New York Rules of Professional Conduct, 22 NYCRR § 1200, *et seq.*, to maintain and preserve the impartiality of the PSC and the DPS in OCS complaint proceedings and to prevent such "deals" from being struck to the disadvantage of submetered customers, particularly low income customers.

ID Issue 8 Tenants were not offered a written deferred payment agreement (dpa). Tenants were also not offered budget billing or quarterly billing for elderly customers.

The ID erred in its statement that "Nelson Management does offer budget billing *and has done so since the inception of its submetering program.*" OCS' simple discovery of Nelson Management's contract with American Metering & Planning Services would have shown that Budget Billing was not included in the "base service" of monthly meter reading, bill preparation, mailing, data storage and responses to tenant inquiries. Rather, to offer budget billing AMPS would charge an additional 30¢ per meter, per month. In addition, numerous tenants telephoned AMPS to request budget billing and were advised by AMPS that budget billing service was not a part of Nelson Management's contract.

HTTA was entitled to a full investigation of its complaints. In issuing the ID, OCS erred in relying on Nelson Management's *ex parte* statements that served to obfuscate the conditions of submetering at Hazel Towers. It deserves reiteration that OCS, its counsel, the Commission, and attorneys practicing before the Commission should adhere to the New York Rules of Professional Conduct, 22 NYCRR § 1200, *et seq.*, in OCS complaint proceedings to maintain and preserve the impartiality of the PSC and the DPS and to deter misleading, self-interested presentations.

Now that budget billing has been instituted as a result of this complaint, there is no remedy or relief available to HTTA members who may have experienced past financial hardship as a result of Nelson Management's deliberate denial of this HEFPA right, and its flagrant violation of the Public Service Law, Commission regulations and the Submetering Order.

The ID also erred in its determination on deferred payment agreements, noting that Nelson Management will make DPAs are available to "qualified" customers; and will "work with" customers who can show "financial need," all without ever defining these abstract terms. Since June 2008 when the complaint in this matter was filed, HTTA members have experienced difficulties negotiating DPAs with Nelson Management. Problems encountered include unreasonably intrusive inquiries for financial information and demands for monthly payments in arbitrary amounts. For example:

- The Commission recommends the financial disclosures attached hereto as ***Exhibit A***. The Commission's recommended financial disclosure form helps to protect

customers' private financial information by requesting, for example, a total sum of monthly installment debt obligations, such as credit cards.

- Nelson Management is proffering the "Asset Check List" attached as ***Exhibit B***. This document makes extensively detailed requests for confidential information. For example, compare Nelson Management's demand for a "list all credit cards, balances due and the amount of the monthly payment on each" to the Commission's request for "Installment payments: (credit cards)."
- No guidelines have been announced by OCS or Nelson Management as to how it "evaluates" submetered customers' ability to pay based on the financial disclosures.
- Appended as ***Exhibit C*** is a proposed DPA signed by Nelson Management's agent on March 12, 2009. In four places, the text refers to termination of electric service (¶¶ 2, 8, 9, 15) which is disallowed under the Submetering Order.
- Nelson Management's answer to HTTA's complaint dated November 13, 2008 stated to OCS:

> Below are Nelson Management's responses and explanations to PULP's allegations of HEFPA violations and evidence that all applicable regulations are now fully complied with.[61]
>
> Nelson Management is in full compliance with the submetering Order, the New York State Public Service Law and corresponding regulations (including HEFPA) as they relate to submetering at Hazel Towers.[62]

HTTA submits that Nelson Management's DPA (***Exhibit C***), which threatens termination in no less than four places, illustrates the disingenuousness of Nelson

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61 Letter to Deborah Sippel from Nelson Management, November 13, 2008, p. 4.

62 *Id.* at p. 7.

Management's *ex parte* representations to OCS. Furthermore, Nelson Management did not provide the DPA to OCS with its November 13, 2008 response, indicating that it was either withheld for some good reason, or worse, it was developed *after* OCS instructed Nelson Management to omit all references to termination of electric service from its submetering documentation. This matter offers another illustration of how OCS erred in not conducting its own, complete investigation of HTTA's complaints, and erred in relying on Nelson Management's self-serving statements, and erred in engaging in *ex parte* written and oral communications with counsel for Nelson Management.

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 8 as follows:

(i) a decision directing Nelson Management to revise its "Asset Check List" to bring it in line with the Commission's reasonable and appropriate financial inquiries allowed in connection with negotiations for deferred payment agreements;

(ii) a decision directing Nelson Management to remove all direct and implied references to termination of electric service from its "Deferred Payment Agreement, inasmuch as the Submetering Order does not permit termination of electric service;

(iii) a decision directing OCS to further and fully investigate the criteria and financial formulae used by Nelson Management to arrive at monthly payment amounts for customers with whom it enters into deferred payment agreements, and to disclose said formulae to OCS, HTTA and its counsel;

(iv) a recommendation to the Commission that commencing immediately, DPS attorneys and attorneys practicing before the Commission adhere to the

> New York Rules of Professional Conduct, 22 NYCRR § 1200, *et seq.*, to maintain and preserve the impartiality of the PSC and the DPS in OCS complaint proceedings, and to encourage OCS to conduct its own investigation into the issues complained of, rather than rely upon contrite statements of regulated entities already known to OCS to be in violation of the Public Service Law, Commission regulations and Commission orders, and when such statements are time and again proven to be incorrect.

ID Issue 9 PULP alleges that Nelson Management failed to annually notify its tenants of their rights regarding HEFPA, complaint procedures, and Life Support equipment customer protections.

The ID erred in approving Nelson Management's defective Notification, for the reasons set forth under ID Issue 3(c) above. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the same relief set forth under ID Issue 3(c) above.

ID Issue 10 PULP stated that the submeterer did not reduce the tenant's monthly rent accordingly (as stipulated by the Commission Order and by the New York State Division of Housing and Community Renewal (DHCR) once the submetering began.

The ID erred in interpreting HTTA's claim as stated above. HTTA's claim, is that the Submetering Order specifically provides:

> The electricity charges and concurrent rent reductions will go into effect for each such apartment upon the expiration of the current apartment lease. (Submetering Order at p. 3)

However, as the ID confirms, Nelson Management "verified that all rent reductions were applied the first month the submetering began." Nelson Management applied "electricity charges and concurrent rent reductions," but it did not wait for the current leases to expire, and to offer renewal leases containing valid rates, terms and conditions of service approved by the Commission. Therefore, Nelson Management violated the Submetering Order and "jumped the gun" by billing tenants for submetered

electricity *before* their leases expired and *before* any new lease provisions on submetering ordered by the Commission were offered, and accepted by tenants.

In summary, Nelson Management (i) failed to show it incorporated the provisions ordered by the Commission into its offers of lease renewal; (ii) failed to show it implemented electricity charges and rent reductions upon expiration of existing leases and formation of service agreements with tenants as ordered by the Commission, and (iii) implemented electricity charges building-wide, without regard to lease expiration and lack of any tenant consent to valid service agreements. As a result Nelson Management did not establish valid contracts with tenants for the provision of electric service at Hazel Towers. Instead, it unilaterally began to impose charges for submetered electricity without a valid writing signed by the parties to the contract.

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 10 as follows:

(i) a decision directing Nelson Management to refund to tenants all amounts paid for submetered electric service since submetering commenced, on grounds that no valid lease rider or service agreement establishing the rates, terms and conditions of electric service approved by the Commission was ever entered into, in violation of the Submetering Order;

(ii) a decision prohibiting Nelson Management from billing tenants for submetered electric service until a valid lease rider or service agreement is implemented upon the future expiration and renewal of tenants' leases, as specifically provided in the Submetering Order.

ID Issue 11 PULP requests the submeterer to include the current rate for charges as well as the direct rate (from Con Edison) on every electric bill for service for comparison purposes.

The ID erred in its determination that "this comparison on every monthly electric bill is not required." HTTA concedes that there is no requirement in law or regulation, but absent the comparative information, there is no way for submetered customers to monitor compliance with the rate cap, which *is* required by Commission regulation and Commission Order. Thus the rate cap standard articulated on the Commission's Submetering Order and submetering regulation is as best, elusive, if submetered customers have no way to determine whether the standard is being met. HTTA notes that several monthly invoices appended to the ID as Exhibit E provide the SC-1 comparative price information, demonstrating that Nelson Management can easily supply this information. In view of Nelson Management's contumacious and numerous violations of the Public Service Law and the Commission's Submetering Order, all of which have gone unsanctioned, it is equitable to require Nelson Management to provide this information to its submetered customers, who have been overcharged, threatened and disadvantaged by its submetering practices.

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 11 as follows:

(i) a decision directing Nelson Management to calculate and compare the amount that Hazel Towers submetered customers would pay each month under direct metered Con Edison residential rates and to provide such comparison on each monthly bill for submetered electric service.

ID Issue 12 PULP requested that the Commission investigate the submetered billed electric charges for all tenants at Hazel Towers

The ID confirms that the Commission did not investigate the submetered billed electric charges for all tenants at Hazel Towers. Instead, OCS permitted "Nelson Management review every tenant's billed electric charges and provide Staff with a billing history *for every month where tenants were billed in excess of the direct metered rate for Con Edison.*" Therefore, OCS never conducted a full audit of Nelson Management's billed charges to tenants, nor did it even receive a full billing history for each tenant from the commencement of submetering. Instead, OCS reviewed the billing histories for 9 monthly statements over the 28-month period from the commencement of submetering until the ID was issued in August 2009, which were provided by Nelson Management and appended to the ID as Exhibit G.

HTTA's complaint has therefore not been fully investigated. HTTA members should not be placed in the position of relying on the good faith of Nelson Management to report overcharges; when it has repeatedly been shown to have flagrantly violated the Submetering Order, Commission regulations and the Public Service Law. HTTA requested and is entitled to a full, impartial investigation by OCS.

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the

OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 12 as follows:

(i) a decision ordering Nelson Management to provide OCS with a full audit of billing history for all submetered accounts at Hazel Towers from the inception of submetering in April 2007 through the date of the ID in August 2009, and to refund to tenants, by a date certain, all amounts overcharged for electric service in that period;

(ii) a decision ordering Nelson Management to identify tenants overcharged who are no longer tenants at Hazel Towers, the amounts they are owed, and the disposition of the refunds that those tenants are due.

(iii) a recommendation to the Commission that commencing immediately, DPS attorneys and attorneys practicing before the Commission adhere to the New York Rules of Professional Conduct, 22 NYCRR § 1200, *et seq.*, to maintain and preserve the impartiality of the PSC and the DPS, and to encourage OCS to conduct its own investigation into the issues complained of, rather than rely upon "self regulation" of regulated entities already known to OCS to be in violation of the Public Service Law, Commission regulations and Commission orders, and when such statements are time and again proven to be incorrect.

ID Issue 13 PULP is alleging that the submetering should have commenced for tenants with the renewal of their new leases, and not all at once.

The ID erred in making no decision at all on this issue. The ID states the date of the Commission Order; the date submetering began; the dates on which tenants were informed (by memorandum) of submetering, and the date that DHCR issued its Order Granting Permission to Terminate Rent Inclusion of Electricity.[63] The ID further noted that Nelson Management stated that it would, at some future time, include the Commission-ordered submetering language in a lease rider, but the rider was not attached to leases before submetering began in April 2007, but rather, "began sometime in 2008."

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63 ID at Issue 13, p. 5.

The above statements do not constitute a decision by OCS on whether Nelson Management failed to establish valid agreements for electric service or violated the Commission's Submetering Order, which clearly stated:

> The electricity charges and concurrent rent reductions will go into effect for each such apartment upon the expiration of the current apartment lease. (Submetering Order at p. 3)

This issue is discussed above under ID Issue 1(b) and ID Issue 10, and remains unresolved. Nelson Management (i) failed to incorporate the provisions ordered by the Commission into its renewal leases; (ii) failed to implement electricity charges and rent reductions upon expiration of existing leases as ordered by the Commission, and (iii) implemented electricity charges building-wide, without regard to lease expiration and the lack of knowing tenant consent to electric service on Commission-approved terms and conditions. As a result Nelson Management did not establish valid contracts with tenants for the provision of electric service at Hazel Towers.

Nelson Management substantially violated the Commission's Submetering Order and is continuing to show contempt for the Commission and its Order, and never sought waiver, modification or other relief from the Submetering Order. HTTA requests the OCS hearing officer to enforce the Commission's Order, and requests the following relief for ID Issue 10 as follows:

(i) a decision directing Nelson Management to refund to tenants all amounts paid for submetered electric service since submetering commenced, on grounds that no valid lease rider establishing the rates, terms and conditions of electric service approved by the Commission was ever entered into, in violation of the Submetering Order;

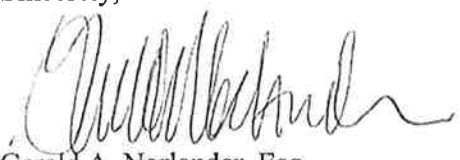
(ii) a decision prohibiting Nelson Management from billing tenants for submetered electric service until a valid lease rider is implemented upon

the future expiration and renewal of tenants' leases, as specifically provided in the Submetering Order.

Conclusion

In accordance with 16 NYCRR § 12.14, we request that the Informal Hearing Officer, "give consideration to the evidence and facts of the case, and base the decision on his or her findings, applicable State law, commission rules, regulations, orders and opinions, and utility tariffs." We further request that the decision "summarize the positions and arguments of the customer and the utility, the facts as established, the reasons for the decision, and, where appropriate, include a statement of what actions must be taken by the parties."[64] Thank you for your consideration of these matters.

Sincerely,



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cc: Joseph Amicone, Esq.

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[64] 16 NYCRR § 12.14.

Exhibit A

ASSET CHECK LIST:

CONFIDENTIAL

Evaluation of Customer's Ability To Pay

1. Employer Name, Address and Phone Number

_____

_____

2. What is your monthly income? _____

3. Please identify all other forms of income (Unemployment, Disability, and Public Assistance) and the amounts of each

_____

_____

4. Please list all checking and savings accounts and balances:

_____

_____

5. Please list all credit cards, balances due and the amount of the monthly payment on each:

_____

_____

_____

_____

_____

6. Do you own your home or do you rent? _____

7. What is your monthly mortgage or rent payment? _____

8. List other assets (i.e., Stocks and Bonds) :

_____

_____

9. List other debts (bank loans, credit lines, utility bills, etc.) and the amount of the monthly payment on each:

_____

_____

_____

_____

_____

_____

10. Identify all other monthly expenditures by amount:

— Food expenses	$_____
— Medical expenses	$_____
— Telephone bills	$_____
— Utility bills	$_____
— Mandatory loan/credit card payments	$_____
— Other	$_____

Exhibit B

APPENDIX A-3

A. INFORMATION ON LIQUID ASSETS AND CURRENT INCOME

1. **Liquid assets, such as cash, bank savings or checking accounts, etc. should be listed:**

   Cash on hand $_____

   Bank checking account No. _____ Amt. presently in account $ _____
   Bank savings account No. _____ Amt. presently in account $ _____
   Name and address of Banks _____

2. **Income information:**

Source of Income:	**Work**	**Yes_____No**	**_____Amt.**	**_____**	**(week) (month)**
	SSI	**Yes_____No**	**_____Amt.**	**_____**	**per mo.**
	Public Assistance	**Yes_____No**	**_____Amt.**	**_____**	**per 2 weeks**

   If you are a recipient of Public Assistance, have you requested your local Social Services office to guarantee future payments?
   Yes_____ No_____

B. EXPENSES	**MONTHLY PAYMENT**	**AMT. OWING**
Housing: Rent_____ Own_____		
Food: Food Stamps: Yes_____ No_____		
Medical expenses: (incl. prescriptions)		
Utility: (gas and electric)		
Heating: (if not gas or electric)		
Telephone:		
Installment payments: (credit card)		
Transportation:		
Car expense: (loan, gas, etc.)		
Education:		
Other:		

I, the undersigned, do hereby certify that the above information provided is the truth, to the best of my knowledge.

_____
(Signature)

_____
(Date)

Exhibit C

DEFERRED PAYMENT AGREEMENT

THIS DEFERRED PAYMENT AGREEMENT (the "Agreement") is by and between Nelson Management, with offices at 118-35 Queens Blvd, Forest Hills, NY 11375 and

NY 10461. This Agreement requires regular periodic payments of past due balance for electric service as well as the timely payment in full of each current bill for electric service.

1. Nelson Management is required to offer a payment agreement that you are able to pay considering your financial circumstances.

2. **If you sign and return this form, along with the down payment, by you will be entering into a payment agreement and by doing so will avoid termination of service.**

3. **This agreement should not be signed if you are unable to keep the terms thereof.**

4. Alternate terms may be available if you can demonstrate financial need. Alternate terms may include no down payment and payments as low as $10 per month above your current bills.

5. Assistance to pay utility bills may be available to recipients of public assistance or supplemental security income from your local social services office.

6. This agreement may be changed if your financial circumstances change significantly because of conditions beyond your control.

7. In addition to the payments required by this Agreement, you must also make timely and full payment of current charges for electric service.

8. If you do not sign this agreement or pay the total amount due of by , Nelson Management may seek to terminate your service.

9. If after entering into this agreement, you fail to comply with its terms, Nelson Management, after complying with all statutory and regulatory notice requirements, will seek to terminate your service.

10. **If you are unable to pay these terms, if further assistance is needed, or if you wish to discuss this agreement please call Nelson Management at (718) 997-9500 ext 305.**

PAYMENT OF OUTSTANDING BALANCE

11. The total Amount owed to Nelson Management for this account as of

12. The down payment required under this Agreement is

13. The amount due for each installment of this Agreement is $ except for the final installment, which will be $

14. Each installment payment shall be due on or before the day of each month beginning with the first such payment due on or before . Payments shall be made for a total of consecutive months with the final payment due on or before .

ACCEPTANCE OF AGREEMENT

15. The terms of this Agreement, as set forth herein, are acceptable to Nelson Management. Please sign and date below in the space provided if you wish to accept the terms of this Agreement. If you decide to sign below, this Agreement will become effective and binding. If you and Nelson Management cannot negotiate a payment agreement, or if you need any further assistance, you may contact the Public Service Commission at 1-800-342-3377.

Return one copy of this agreement signed, with the down payment, by
If it is not signed and returned, Nelson Management may pursue termination of your electric service.

16. If you are not already enrolled in our Budget (Levelized) Billing Program, which allows you to pay for your service in equal monthly installments, and wish to enroll, check the box below and we will start you on our program immediately. Payments under this program are typically based upon you prior 12-month experience, adjusted for known charges.

[ ] Yes! I would like Budget Billing.

Customer Signature: _____

Print Name: _____

Date: _____

Nelson Management Signature: Christine Chorny

Print Name: Christine Chorny

Date: 3/12/09