STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

CASE 94-E-0883 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures--Appeal by Consolidated Edison Company of New York, Inc., of the Informal Decision Rendered in Favor of Soren Management, filed in C 26358 (459516)

COMMISSION DETERMINATION
(Issued and Effective July 31, 1998)

This is an appeal by Consolidated Edison Company of New York, Inc. (the utility or Con Ed), to the Commission from an informal decision, issued September 8, 1994 (copy attached), in favor of Soren Management, the complainant.[1] The complaint asserted that three electric accounts billed separately to complainant since 1981 should be combined for billing purposes, on the theory that separate service laterals and meters were installed by the utility in the 1950's (when service was commenced) to serve these premises, for the utility's own purposes rather than at the request of the original customer. The informal hearing officer found that, absent definitive documentation showing that three service lines and meters were installed for customer purposes, the utility should combine the billing of the electric accounts, as well as those of three corresponding and separately billed gas accounts, prospectively and retroactively for the six preceding years. We conclude that the informal decision should be reversed and the utility's appeal granted, for the reasons explained below.

BACKGROUND

The premises in question (415 East 52nd Street) consist of three towers (referred to as A, B and C) of residential apartments over a common basement, located on the east side of Manhattan with frontage on both 52nd and 53rd Streets. The construction was completed in the mid-1950's, and the premises have received steam, electric, and gas service from the utility since that time. The utility provided a separate

[1] Complainant has been represented throughout this complaint proceeding by a consultant, Urac Corporation.

electric service lateral to serve each tower, and apparently all three laterals also provide service to lobby and basement areas. Each electric line serves not only complainant's three meters for areas outside the apartments, but also meters for the individual apartments which are billed separately to the occupants. The premises are also supplied with gas by three gas lines (one for each tower); the gas service to the tenants' apartments in each tower is provided through a master meter on each service line. For heat and hot water, the premises are served by a single steam connection and meter.

Complainant has been the customer of record, and has been billed separately for each of the three electric meters (each connected to a different electric lateral) since 1981. In 1990, for the first time, complainant objected to its electric billing and asserted to the utility that it was entitled to combined billing.[2] The utility has consistently maintained that it no longer has any records concerning why the electric (and gas service) was installed using three service lines, or showing how the original customer or any intervening customers were billed for these meters; and that its billing of complainant is proper. Complainant requested review of its complaint by the Department of Public Service, Consumer Services Division (CSD), by letter dated April 4, 1991, and staff then concluded that complainant was not entitled to combined billing.[3] Complainant then sought an informal hearing.

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[2] The consultant first raised this matter with the utility by letter dated July 17, 1990. The utility visited the premises, reviewed the meter locations and, on February 6, 1991, sent the consultant a letter stating that the customer did not qualify for combined billing. Combined billing refers to the practice of allowing a customer, under certain circumstances, to be billed for the combined registrations of two or more meters as if all usage was being registered by a single meter.

[3] Following CSD's investigation, a staff member informed the consultant by letter dated June 18, 1991, that complainant was not entitled to an adjustment. After further correspondence, staff reaffirmed this conclusion in a letter dated March 31, 1992.

INFORMAL DECISION

After further investigation, an informal review was carried out, and a decision issued on September 8, 1994. The decision notes that the complaint initially concerned only the electric billing but was later broadened to make the same claim with respect to gas billing. (No written arguments by the parties deal with the issue of billing for gas service.) The informal decision (p.4) finds that the premises consist of "three sections, characterized as ’towers’" and that each meter is located in the basement of its respective section of the building. The decision notes that the current New York City Electrical Code states that, with certain exceptions, a building is supposed to be served by a single service lateral. The decision states that in the absence of proof that special permission (which the hearing officer concluded would have been needed) had been obtained from the New York City Department of Buildings to serve this building by more than one electric lateral, the utility has failed to substantiate its position that the installation of three service laterals was done for customer purposes as opposed to utility purposes. The decision then concludes that, because the utility has not provided "definitive documentation" showing that the installation of three separate service lines and meters for utility service was done for the customer’s purposes, complainant is entitled to be billed for its electric and gas usage on the basis of the combined usage shown on the three respective meters, and to have its electric and gas bills recalculated on this basis for the six preceding years, with interest. No separate basis is given for the decision regarding gas billing (to which the New York City Electrical Code provision is irrelevant) and no gas tariff provisions are cited.

POINTS ON APPEAL

On appeal,[4] the utility contends that the informal decision (that the premises involved must have been entitled to combined billing) is incorrect and arbitrary because: (1) complainant's claim that three service lines were installed for utility purposes rather than at the original customer's request is based on speculation; and (2) complainant's claim is stale. With respect to the New York City Electrical Code provision relied on by the hearing officer, the utility asserts that no showing has been made that the code provision was in effect when the electric facilities were installed or that it was applicable to the premises or imposed an obligation on the utility.

As exhibits to its appeal, the utility submits documentation concerning the steam installation at the premises in 1954 and 1955 which it says confirms that the premises were regarded as three buildings, not one building.[5] Exhibit 1 is an

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[4] The utility appealed by letter dated October 20, 1994. We have reviewed complainant's assertion that the utility's appeal was untimely, and conclude that the utility was given extensions of its time to appeal and that the appeal was timely.

[5] In an October 28, 1994 letter opposing the appeal, complainant asserts that the utility's producing these documents indicates that it could also produce similar documentation with respect to the electric and gas installations at the premises and should do so. However, we take notice of the fact that Con Ed is an extremely large combination utility which operates in three separate industries (electricity, gas and steam) over a large territory. Steam is by far the smallest of Con Ed's operations (only approximately 2,000 customers, all located in Manhattan, south of 96th Street) and is handled by different employees. We do not find it surprising that records with respect to a steam installation might still be available while records regarding electric or gas installations are not. Moreover, while it would have been preferable for the utility to provide these records prior to the informal decision, these are in fact records about steam service to the building, about which complainant raised no issue. The possibility that steam records might provide any relevant information may well not have been recognized. In this case the information was provided to complainant at the same time as it was provided to the Commission, and complainant has had the

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Agreement for [steam] Service, dated September 24, 1954, which identifies the premises to be supplied with steam as 399-423 East 52nd Street and 404-420 East 53rd Street, with the billing address listed as Sutton House, 415 E. 52nd St., NY, NY. Exhibit 2 is a request dated November 16, 1955, that steam be turned on permanently, and a utility turn-on form dated November 21, 1955. Exhibit 3 is a series of internal memos and engineering reports about the steam installation; one of these reports or memos, consisting of handwritten notations by E. Rote, dated August 9, 1956, states that the premises consist of three buildings identified as building A (on the 52nd Street side), building B (also on the 52nd Street side) and building C (on the 53rd Street side), with the utility's steam service equipment being located in building B. Exhibit 4 includes an Inspecting Engineer's Report on 399-423 East 52 St., date-stamped December 16, 1955, which states:

> Visited this premises upon Special request, there are 3 large apartment houses to be supplied with heat & hot water . . . . These buildings are still in the construction stage, prior to last Monday only one building was utilizing steam for heating, since Monday there are two buildings being heated . . . .

Exhibit 4 also includes an internal memorandum from W. A. Branscobe, dated May 19, 1958, which deals with high steam consumption and cost at 399-423 East 52nd Street; this memo states, inter alia, "Sutton House consists of three buildings served from one meter room."

DETERMINATION

This appeal raises the issue of whether the utility is correct in billing the customer on a separate account for each of the electric meters at the premises, or whether the customer in fact is entitled to combined billing (i.e. billing for the

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opportunity to respond to it. Given that an appeal reviews an informal decision, rather than a formal evidentiary hearing, we conclude that there is no objection to us considering this relevant information. (Indeed, our staff occasionally asks a parties to appeals from an informal decisions to provide additional information, on notice to other parties.)

combined total of all usage registered by the different electric meters, or gas meters, at the premises, as if there were a single meter) on the basis that separate meters were installed more than 30 years prior to the complaint because of conditions on the utility's distribution system and for the utility's purposes. The claim here is similar to that made in case we decided in 1996, 92-E-0742, Appeal by Punia and Marx of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., Commission Determination (November 13, 1996).[6] In both cases a current utility customer asserts that it is entitled to combined billing because, many years ago, Con Ed should have established the original customer at the premises as entitled to combined billing on the basis that multiple meters were supplied for the utility's own purposes and convenience and not for the customer's. Our conclusions in the present case are consistent with those we reached in Punia and Marx: that no entitlement to combined billing has been shown (see pp.9-10, infra).

Under the utility's electric tariff at the time service was installed (PSC No.6-Electricity, III-7[a], First Revised Leaf No.12), and at present (PSC No.9-Electricity, III.A[8], Original Leaf No.37), if multiple meters were installed because of conditions on the utility's distribution system which made it necessary or more desirable from the utility's point of view to provide the service to a particular building or premises through multiple meters, then the original customer was entitled to combined billing of the meter registrations, and subsequent customers would be also.[7] In addition, before June 1, 1959, under the conjunctional billing and intercommunicating buildings

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[6] We recently upheld this determination on consideration of complainant's request for rehearing. Case 92-E-0742, Punia and Marx, supra, Commission Determination on Rehearing (July 14, 1998).

[7] These tariff provisions, and related ones, are quoted in our recent decision in Case 92-E-0742, Appeal by Punia and Marx of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., Commission Determination on Rehearing (July 14, 1998), pp.7-8, note 12.

riders of the utility's tariff (riders B and C of the electric tariff), any customer who owned or leased buildings or separate parts of buildings meeting proximity (and in the case of the rider C, interconnection) requirements could obtain combined billing under these riders without any concern about whether multiple meters were installed for the customer's or the utility's purposes; however, since June 1, 1959, combined billing pursuant to these riders has been prohibited except that customers who were receiving such billing as of May 31, 1959 were allowed to retain it until such time as the identity of the customer for the service changed.[8]

In this case, the utility has billed complainant separately for each of these meters since complainant became the customer of record in 1981, and has no information about prior billing of the original or intervening customers. Complainant does not claim any actual knowledge of why the premises were served in the manner they were, but instead argues that tariff provisions and the utility's inability to produce documentation indicate that service could only have been supplied in this instance through multiple laterals and meters for the utility's own reasons--a scenario which, complainant argues, justifies combined billing despite the fact that complainant has been billed since 1981 for each meter separately.

Specifically, complainant notes that each of its three electric meters is served by a separate service lateral, and argues that the premises constitute a single building which was only eligible under the tariff to be served by a single electric

[8] Cases 18011, 18012 and 18013, Proceeding on motion of the Commission as to the proposed change in the rates, charges, rules and regulations of Consolidated Edison Company of New York Inc. for electric service (Conjunctional Billing and Intercommunicating Buildings), Memorandum, 26 PUR3d 243 (issued May 26, 1959), and Memorandum and Order on Rehearing (issued January 12, 1960); PSC No.6-Electricity, VI., Second Revised Leaves Nos. 23 & 24; PSC No.9-Electricity, VI, B and C, Original leaves Nos. 86 & 88.

service line.[9] Therefore, complainant urges, any additional service lateral must have been provided for one of the two following reasons: (1) because complainant requested it; or (2) because the utility for its own purposes chose to provide service using additional lines. Complainant argues further that, in the first case, the original customer would have had to sign an excess distribution agreement in order to obtain an additional service lateral and subsequent customers including complainant would have been billed in perpetuity for the excess laterals;[10] and, in the second case, the original customer and its successors including complainant were and are entitled to combined billing under the utility's tariff for the meters resulting from the utility's decision to serve the premises by three service laterals. Since the utility has not produced an excess distribution agreement for these premises, complainant argues that its second alternative is correct, and the utility must have chosen to serve the premises by three laterals and to impose on the original customer the requirement of using three laterals to

[9] The relevant tariff provision, at the time electric facilities were installed in this case, stated that "Electric Service will be supplied to each building or premises through a single service lateral, except where, for reasons of Company economy, conditions on the Company's distribution system, improvement of service conditions, or magnitude of the Customer's load, the Company elects to install more than one service lateral." PSC No.6-Electricity, III.4(a), Original Leaf No.10. The current (substantially unchanged) version of this provision is PSC No.9-Electricity, III.3(b)(1), Second Revised Leaf No.27.

[10] The utility's tariff, at the time the electric facilities were installed, stated: "Upon written application of a customer . . . the Company will provide at the Customer's expense distribution facilities for supply of service, in excess of those normally provided by the Company under the other provisions of this Schedule, for the purpose of supplying equipment the operation of which involves inrush currents above the values otherwise allowed by the Company, or for the purpose of providing a service lateral in addition to that otherwise provided for supply of the Customer's premises. . . . ." PSC No.6-Electricity, III.4(e), Original Leaf No.11. A form for the application was also provided following Original Leaf 35 in PSC No.6-Electricity.

provide electric service to public areas of the premises, thus entitling complainant to combined billing.

Although in a customer complaint proceeding the utility is normally expected to produce records to show whether its billing is correct and accurate (see 16 NYCRR §12.1[c]), when because of the passage of time relevant records are no longer available, and are no longer required to be retained (under utility procedures which are consistent with applicable Commission regulations, if any), it is inappropriate to draw conclusions adverse to the utility based on the nonretention of the records.[11] In such a situation, in the absence of evidence to the contrary, "a utility is entitled to a presumption that its actions, and the actions of its employees, are legal, authorized and honest."[12]

In the instant case, because of the passage of time (it is now 40 years since the original electric facilities were installed), records are no longer available or required to be retained, and complainant must demonstrate that an error has occurred. Complainant fails to make such a showing, because its argument is speculative and unsubstantiated. The only specific, contemporaneous evidence which indicates on what basis three electric laterals were installed is the utility's documentation regarding the steam installation, which shows that the utility regarded the premises as three buildings.[13] For three

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[11] Cases 93-C-0636 and 94-C-1058, Appeal by Super-Tech et al. of the Informal Decision Rendered in Favor of New York Telephone Company, Commission Determination (issued August 28, 1996), pp.15-16. See also Case 93-C-0193, Appeal by Yokoyama Foods of the Informal Decision Rendered in Favor of New York Telephone Company, Inc., Commission Determination (issued April 21, 1993).

[12] Case 92-E-0742, Appeal by Punia and Marx Inc. of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., Commission Determination, p.7 (issued November 13, 1996).

[13] Even if we did not consider the steam documentation, complainant has made no showing of any error in the separate billing of these meters that overcomes the presumption that the utility's conduct, and that of its employees', was proper.

buildings, three service laterals were appropriate under the tariff provision, and the customer receiving the service (and subsequent customers) would have no right to combined billing for that service, unless the customer qualified for such billing under the utility's tariff riders B (conjunctional billing) or C (intercommunicating buildings). While the original customer at the premises was presumably eligible for billing under one of these riders, complainant, who only took service in 1981, has never been eligible for combined billing on this basis.[14]

Complainant argues that these premises consist only of a single building. The utility's tariff has stated, at all times relevant to this complaint, that, "Electric service will be supplied to each building or premises through a single service lateral, except where, for reasons of Company economy, conditions on the Company's distribution system, improvement of service conditions, or magnitude of the Customer's load, the Company elects to install more than one service lateral."[15] However, the tariff did not, when service to the premises was installed, define either the word "building" or "premises," and did not indicate specifically how premises consisting of multiple buildings were to be served, with respect to number of laterals.[16] The record in this case supplies no basis for concluding that the premises either could not properly have been treated by the utility as three buildings, or for concluding that this did not occur--in fact, the steam documentation suggests that this is indeed what occurred. Put another way, no basis

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[14] Combined billing under Con Ed's conjunctional billing and intercommunicating buildings riders was no longer available to new customers after May 31, 1959. However, customers who had such billing, as of May 31, 1959, were allowed to retain it so long as the identity of the customer did not change. See pp.6-7 and note 8, supra.

[15] See PSC No.6-Electricity, III.4.(a), Leaf No.10; PSC No.8-Electricity, III.5.(a) Leaf No.11; PSC No.9-Electricity, III.3.(B)(1), Leaf No.27.

[16] These ambiguities have not been clarified subsequently in the tariff.

exists in the record here for concluding that the utility incorrectly applied its tariff regarding number of service laterals to be installed at these premises during the mid-1950's, nor do we believe this is a question we can now fairly consider or resolve, given the passage of time.[17]

Complainant argues that the utility's decision to provide steam service to the premises by means of a single service connection is inconsistent with the utility's argument that the premises were regarded as three buildings for purposes of the electric and gas installations. However, there appears to have been nothing in either of the steam tariffs which may have been in effect when the steam facilities were provided that precluded the utility from opting to install steam service to the premises through a single service connection.[18]

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[17] The decision about how service should be provided to a large, high rise property was presumably a complex one in which other factors besides obtaining the lowest possible future utility bills might figure, making current attempts to determine exactly why a particular configuration was chosen futile. Moreover, even if we were to assume that lowering utility bills was paramount in the decision-making for the original customer in the instant case, that customer would presumably have been eligible at that time for combined billing under Con Ed's conjunctional billing or intercommunicating buildings riders, which would have made the installation of multiple laterals and meters a matter of indifference with respect to impact on billing costs.

[18] The application for steam service to these premises is dated September 24, 1954. The steam service connection was apparently installed sometime between then and November 16, 1955, when the original applicant requested that steam be turned on permanently. The relevant tariff in effect in September 1954 was PSC No.4-Steam, New York Steam Corporation, which was superseded on January 1, 1955 by PSC No.1-Steam, Consolidated Edison Company of New York, Inc. These tariffs both state that, "Application for service may be made by an owner or occupant to whose building or premises the Company's service is or can reasonably be made available." PSC No.4-Steam, III.1(a) Original Leaf No.3; PSC No.1-Steam, III.1(a)Original Leaf No.3. The tariffs also state that, "the Company will install a service line to a point just inside the vault wall or building line of the . . . [customer's] premises, determined by the Company to be convenient and practicable, and at such point will install its service stop valve." PSC No.4-Steam, III.2(a), Original Leaf No.4; PSC No.1-

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The informal decision relies on a current New York City Electrical Code provision (Article 3, §27-3041) which states, with respect to overhead or underground service:

> b. In general, a building shall be supplied through only one set of service conductors. Additional sets of service conductors are permitted, either from the same transformer or transformers, from the same secondary distribution system, or from a separate source of supply, when the separate service is required for the following:
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> 1. Fire pumps.
>
> 2. Emergency lighting.
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> 3. Capacity requirements, when multiple service would be more desirable, or when existing service conductors supplying a two thousand ampere service equipment, or larger, are carrying at least seventy per cent of their maximum permissible ampere load.
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> 4. Buildings of large horizontal or vertical area and with special permission only, due to the large area over which a single building extends.
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> 5. Multiple-occupancy buildings and with special permission only, where there is no available space for service accessible to all of the occupants.
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> 6. Different voltages or characteristics, such as frequencies and/or phases, etc., which may be required for different classes of use.

The informal decision concluded (presumably on the assumption that this provision was in effect when the electric facilities this complaint concerns were installed) that the

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Steam, III.2(a), Original Leaf No.4. As with the electric tariff, these tariff provisions are ambiguous with respect to what number of service laterals are permitted in the case of premises including more than one building, and would appear to permit the utility, working with the applicant, to choose whether to supply multi-building premises by means of a single connection (to the premises) or by means of separate connections (to each building). Therefore, the provision of steam service to these premises by a single connection did not logically indicate a utility determination that the premises consisted only of one building (indeed the steam documentation suggests the contrary, see pp.4-5, supra).

utility would have been compelled by this provision to obtain "special permission" (which the informal decision assumes would have taken the form of written permits) from the New York City Department of Buildings in order to install multiple service laterals in the mid-1950's to serve these premises, and that the utility was required to have retained these permits. The informal decision also finds that the New York City Electrical Code provision would have precluded the utility from supplying extra service laterals simply because an applicant requested them, and would have limited the availability of extra laterals to the situations specified in the code, all of which, according to the informal decision, were situations in which installation of multiple laterals would have been done for utility purposes rather than for the customer's. The informal decision notes that the utility did not provide any records showing that permits for extra service laterals in fact had been obtained, and concludes that the utility has failed to supply "definitive documentation that it was solely for customer purposes that three service laterals were installed to supply the premises in question."[19]

Both with respect to the New York City Electrical Code and with respect to who has the burden of proof in this proceeding, we conclude that the informal decision is flawed. First, the Code provision should not have been considered without a showing that it was effective at the time the electric facilities were installed.[20] Secondly, regarding the burden of

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[19] Informal Decision, p.6.

[20] Even assuming the same provision did apply in the mid-1950's, we have no certainty that the premises in question would not have been regarded as three buildings for purposes of the Code, as they apparently were by the utility. Moreover, we have no information about how the Code was actually applied, or about what form "special permission" took (written or oral). Finally, even assuming a written special permit was required for multiple laterals here, we know of no reason why the utility would have had to retain that permit for 40 or more years. Accordingly, even if the Code provision had been shown to have existed and been applicable to this electric installation in the 1950's, it appears unlikely that any conclusions could have been drawn from

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proof, as discussed earlier (see p. 9, supra), where the events in question occurred many years ago and records are no longer available (and are no longer required to be retained), the utility is entitled to a presumption that its actions and those of its employees were proper, and in order to prevail complainant must provide evidence that the original customer was indeed entitled to combined billing. In this case, as discussed above, complainant has failed to make such a showing, and there is no basis on which to conclude that the original customer was entitled to combined billing.

Finally, we note that the application of the informal decision to the gas billing was merely ancillary to the primary decision regarding electric. No elaboration of the basis in the utility's gas tariff or elsewhere was provided in the decision, or in the record of the complaint. The assumption in the informal decision seems to have been that the utility's gas tariff provisions with respect to combined billing and conjunctional billing were in relevant respects identical. Under these circumstances, unless the applicable gas tariff contained provisions which would lead to a different result, our conclusion that there is no basis for sustaining the complaint with respect to the electric billing also invalidates the decision with respect to the gas billing. We have reviewed the utility's gas tariff in effect in the mid-1950's, when the gas facilities for these premises were presumably installed, and it provides no basis for a different result.[21]

In order to assure that all aspects of this case have been properly addressed, a staff member has thoroughly reviewed the entire complaint file. We determine that the conclusion of the informal decision, that the utility had to show definitively that the installation in the 1950's of electric and gas service

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[20](...continued)
that fact about why three laterals were installed at these premises.

[21] See PSC No.6-Gas, Consolidated Edison Company of New York, Inc. (effective November 16, 1952 to November 1971).

respectively through three service lines and meters was done for customer purposes, was incorrect. We find that no basis has been shown for concluding that the original customer at these premises was entitled to combined billing under the predecessor of the utility's current tariff provision, PSC No. 9-Electricity, III.A(8), Original Leaf No.37, and accordingly there is no basis for concluding that complainant is entitled to such billing. Therefore, the utility's appeal is granted, and the informal decision is reversed.