

Utility Check Ltd.

200 BERMUDA STREET P.O. BOX 266, ATLANTIC BEACH, NY 11509
(516) 766-2922 FAX (516) 766-2988
info@utilitycheck.com

Petitioner

FL: 26358
06-E-0348
OCS

October 31, 2007

Honorable Jaclyn A. Brillling, Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Case 06-E-0348
Case 06-E-0349
Case 06-E-0350

2007 NOV -6 AM 10:40
EXEC. SECRET.

Dear Secretary Brillling

Enclosed please find Utility Check's original request for reconsideration, along with 25 copies thereof, of the Commission's determination in Cases 06-E-0308, et al, issued on October 19, 2007.

Sincerely



Ellen H. Bindler
President

Enclosures

Utility Check Ltd.

200 BERMUDA STREET, P O BOX 266, ATLANTIC BEACH, NY 11509
(516)766-2922 FAX (516)766-2988
EMAIL:INFO@UTILITYCHECK.COM

October 26, 2007

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

2007 NOV -6 AM 10:40

Re: Case 06-E-0348
200 West 109 Condominium vs. Con Edison

Case 06-E-0349
Atria 200 Associates, LLC vs. Con Edison

Case 06-E-0350
7 MDR of Queens, Inc. vs. Con Edison

Dear Ms. Brillling:

Please be advised that Utility Check, Ltd., on behalf of the above three customers is requesting reconsideration of the Commission's determination in Cases 06-E-0308, et al., issued October 19, 2007, on the grounds that it failed to take into consideration pertinent arguments presented by Utility Check in its original appeal.

Consolidated Edison Company of New York, Inc., ("Con Edison") or (the "utility"), billed the accounts on Service Classification 2 (General-Small) (hereinafter "SC-2"). The utility's Service Classification 1 (Residential and Religious) (hereinafter "SC-1") tariff was modified effective October 23, 1992, specifically to permit an employer to hold an account at SC-1 for an employee's residential occupied account.¹ This complaint concerns the rebilling of

¹ Effective October 23, 1992, the applicability provision for SC-1 was revised to make the residential rate available for:

Light, heat and power, when supplied directly by the company to any . . . building . . . or apartment . . . occupied as the home, residence or sleeping place of the Customer or any employee of the Customer.

these accounts on the correct service classification from turn/on through the date Con Edison initiated SC-1 billing.

The Commission determined that Con Edison fulfilled its responsibility to assist the customer by sending brochures that provide descriptions of its rates to the customers, sometime after turn/on, and that it was then solely the customer's responsibility to request the correct rate, which is SC-1, for these accounts.

In making its determination, the Commission failed to address Utility Check's most important and compelling argument: that Con Edison must comply with the rates set forth in the tariff. There is nothing in the rules, regulations or case law that relieves a utility of this requirement. Con Edison cannot meet its obligation to present accurate bills if the utility does not take steps to assure that the utility calculates the cost of service on the rate required in the tariff.

Con Edison's assignation of SC-2 to an occupied apartment further flies in the face of the conservation efforts that have long been the mainstay of Public Service law. Con Edison, therefore, has the responsibility to ensure who is going to use the service when a proprietor or owner applies for service.

The Commission's decision further denied the customer the right to an informal hearing in accordance with NYCRR Title 16 12.7 (1) (3)³ thereby denying the customer the opportunity to present what transpired between the utility and the customer when requesting service.

**1. THE COMMISSION FAILED TO TAKE INTO CONSIDERATION
COMMISSION DETERMINATIONS AND PSC LAW THAT PROHIBIT SC-2
BILLING FOR THESE ACCOUNTS**

The Commission cited 48th St Owners, 500 West End Ave , Presbyterian Hospital and Phipps Houses, in making its decision in this case. The Commission, however, failed to acknowledge all of the following Commission cases regarding the correct classification for occupied and unoccupied residential apartments held in the names of entities other than the actual occupants, which Utility Check cited in its appeal.

³ To have a reasonable opportunity during an informal hearing to present evidence and arguments concerning the complaint, and to challenge the evidence of and question the other party."

In Case 93-E-0150 regarding superintendents and vacant apartments, the Commission determined “SC-2 is the proper rate for landlords’ or managing agents’ accounts for *vacant apartments*.” [Emphasis added.] ⁴

In Carol Turner, ⁵ the Commission found that, *for energy conservation purposes*, the owner of the building was not eligible for service to apartments occupied by residential tenants under any service classification, including SC 2, and required the tenants to apply for service in their own names. In its determination, the Commission directed Con Edison to provide the following:

- (1) a statement that within 30 days of the date of the utility’s written notification each tenant must apply for service at the SC-1 rate in his or her name;
- (2) the procedure for making such an application;
- (3) a statement that if no such application is received within thirty days of the date of the notice, then service will be terminated.

In Carol Turner, the Commission clearly included all types of residential occupants not responsible for account payment in its determination, stating (p 9):

We agree with the hearing officer that the 1976 order and the resulting revision of the SC-2 tariff do not allow rent-inclusion in directly metered residential apartments even if the building’s wiring predated January 1, 1977. A reading of the Commission’s 1976 opinions in the Rent-inclusion and Submetering Case shows that the Commission intended, subject to this limitation, to eliminate virtually all residential rent-inclusion previously permitted under the existing tariff provisions.

The Commission further stated (p. 10):

A conclusion that the opinion and the tariff provision permit rent-inclusion in directly metered residential apartments...would make no sense in terms of the clearly enunciated policy of *encouraging conservation* by ending a pricing system that failed to make the occupant of a residential dwelling financially accountable for his energy usage. [Emphasis added.]

In Carol Turner, the Commission, considering energy conservation, determined that Con Edison **did not have the option of assigning SC-2 to an *occupied residential apartment*, held in the *owner’s name***. The current determination, however, reverses the Carol Turner decision,

⁴ Case 93-E-0150 – Appeal by various owners and/or managers of Multiple Dwellings Containing Superintendents’ or Vacant Apartments of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., filed in C 26358 (E859069 et al. and E657547 et al.) Issued December 7, 1993 p 15

⁵ Case 93-E-0152- Appeal by Carol Turner of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., filed in C 26358 (E859063).

negates the Commission's previous attempts to *conserve energy* by stating Con Edison may now assign SC-2 to **occupied residential apartments billed to third parties** unless and until the customer requests SC-1 service.

In the Grenadier Realty Corp case,⁶ another case concerning the correct rate of accounts for occupied residential apartments held in the names of entities other than the actual occupants, the Commission stated:

In Carol Turner we found that, because of the Commission's 1976 order⁷ prohibiting rent-inclusion in residential buildings, a building's owner (or the owner's representative) is prohibited from holding an Account for an individually metered, occupied, residential apartment under any classification, unless need for a waiver is shown.⁸

The Bronxwood Home for the Aged case⁹ involved an employer holding accounts for directly metered, residential apartments occupied by employees. In the Bronxwood case, the Commission found, (p. 11):

The utility's tariff makes SC-1 unavailable to a non-occupant of a directly metered, occupied, residential dwelling, except that since October 23, 1992 –when Special Provisions A and B of SC-1, and the applicability provision for SC-1 were amended – employers have been allowed to hold accounts for residential dwelling occupied by their employees.

Subsequent to October 1992, Con Edison's tariff **permitted SC-2 billing for vacant apartments**, only. Thus, it is Con Edison's responsibility to obtain the information necessary to ensure that it abides by its tariff.

2. THE COMMISSION FAILED TO TAKE INTO CONSIDERATION THAT CON EDISON IS OBLIGATED BY LAW TO ASSIGN ACCOUNTS TO THE CORRECT RATE

The Commission failed to take into consideration that, in this case, Con Edison failed to meet its burden of demonstrating that the utility properly classified any of these accounts. Con

⁶Case 91-E-0601 - Appeal by Grenadier Realty Corp of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., filed in C 26358 (E176608)

⁷ Opinion and Order Proscribing Rent-inclusion in new Residential Construction, Permitting Submetering Option for Certain Governmental landlords, and Instituting Further Proceedings on Submetering, 16 NYPSC 724 (Case 26998, August 17, 1976).

⁸ See Carol Turner, Case 93-E-0152 pp 80-12 (Dec.. 7, 1993)

⁹ Case 91-E-0602 – Appeal by Bronxwood Home for the Aged of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., filed in C 26358 (E176609)

Edison's failure to do so results from the fact that Con Edison chose to rely solely on the nature of the customer as a "non human being" as the determinative factor in its classification of the accounts on SC-2. This fact alone, however, is NOT determinative of ineligibility for SC-1. Rather, Con Edison's tariff is the determinative factor, and as previously presented, the tariff allows only SC-1 for occupied apartments under a property owner's name, and only if an employee of the property owner is using service.

Billing a customer on a rate for which he or she is not qualified is no different from any other billing error. Section 66(12) of Public Service Law states:

No utility shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges specified in its schedule filed and in effect.

Therefore, when a utility has rates that are mandatory, it must take deliberate steps to make sure the utility bills its customers in accordance with tariff requirements. Since October 1992, SC-1 has been mandatory of any occupied apartment used for "**any . . . building . . . or apartment . . . occupied as the home, residence or sleeping place of the Customer or any employee of the Customer.**" This fact is not in dispute. Nonetheless, Con Edison placed the accounts in question on a rate for which they were not qualified under the terms of the tariff.

Utility Check bases its position on the Westledge Nursing Home v. Con Edison case, which states:

Regulated utilities are required to publish schedules of charges, they must adhere to such tariff schedules and cannot charge a greater or lesser charge for their services than the rates and charges specified in tariffs...the purpose of requiring the filing of the tariffs is to secure equality for rates and to eliminate favoritism.

The regulated entity has the duty to adhere to its tariff schedules and, even if a lesser charge is assessed because of error or negligence on the part of the company or its employees, the full rate can be recovered. An error in classification has the same effect as an error in rates; the amount legally chargeable under the tariff must be collected. Consistent with this policy of requiring the collection of the full legal rate, neither the misrepresentation of a rate in good faith nor its intentional misrepresentation will prevent recovery of the legal charge.

The principles developed with respect to undercharges also apply to overcharges. Carriers cannot charge more for their service than the rate set forth in the applicable tariff and overcharges may be recovered from the regulated entity.
[Emphasis added.]¹⁰

¹⁰ Recommended Decision of ALJ Redmond Matias, Westledge et al. v. Con Edison, 26358, September 6, 1988, p.18

3. THE COMMISSION FAILED TO TAKE INTO CONSIDERATION THE CUSTOMER'S RIGHT TO PROVIDE EVIDENCE

The Commission's decision deprives the customer the opportunity to present what transpired between the utility and the customer when requesting service.

On August 11, 1987 (See Exhibit 1) Ms. Ellemberg, then Assistant to the Director at Consumer Services Division reassured Utility Check that the Commission still believed a 1939 Commission decision best described the scope of the utility's responsibility with regard to rate selection for the customer. In a 1939 decision, the Commission was decidedly opposed to any attempt upon the part of the utility to limit its liability or obligations under the statutes and court decisions through the insertion in its rate schedules of clauses, which would limit or modify such liability. The court ruling held, "**In view of the complicated rate schedules that are in operation in many companies, consumers are entitled to receive the help of the utility.**"¹¹

The Commission's decision to deny an informal hearing for these accounts, fails to take into consideration that Con Edison's tariff as well as 16 NYCRR Part 13.2 regarding "Service Applications" obligates the utility to do more than merely send brochures, it obligates the utility to secure pertinent information during the application process, as well.

In an attempt to conserve energy, the tariff consistently prohibits rent inclusion in its service. Thus, Whenever Con Edison receives a request for service under the name of a property owner for a residential apartment, it is incumbent upon the utility to determine whether the apartment is occupied, and if so, the utility must then establish the relationship between the occupant and the owner prior to providing service.

The Commission's decision further failed to consider that, previously, when Office of Consumer Services granted informal hearings regarding SC-1 billing for superintendent's apartments, the hearing officers repeatedly determined *in favor* of the customer. Review of

¹¹ Re Brooklyn Edison Company, Incorporated, et al. March 29, 1939 [Case Nos. 9760-9764] P. 195

evidence at the informal level resulted in determinations that Con Edison's failure to obtain the necessary information at turn/on resulted in the selection of the wrong service classification.¹²

Informal hearings for these accounts would no doubt determine, similarly, that Con Edison never asked the appropriate questions. Likewise, in each of these cases, informal hearings would determine that the customers responded to Con Edison's request for information in order to establish the account, and absent a change in requirements, there was no reason to question Con Edison's original rate assignment.

CONCLUSION

Since the October 1992 tariff changes to the SC-1 rate, Con Edison may only assign SC-2 to residential apartments if they are in the owner's or property owner's name and if they are **vacant**. The Commission's decision to allow Con Edison to assign SC-2 to residential, occupied apartments billed under a company name flies in the face of conservation efforts that have long been a mainstay of Public Service law. The decision further contradicts Con Edison's tariff as well as previous Commission determinations.

The utility does not have the right to assign the wrong rate, and then make it necessary for the consumer to identify the error. For these reasons, Utility Check asks that the Commission acknowledges and addresses the arguments and cases cited herein and provide for retroactive refunds on SC-1, or allow either an informal hearing for each of these accounts, or an evidentiary hearing in order to question both Con Edison and the customer under oath.

Sincerely



Ellen H. Bindler
President

Enclosure

cc: Nancy Lee, Appeals Unit
Richard Beale, Consolidated Edison Company

¹² See Complaint 303159 regarding Millbrook Properties, as well as E561730, regarding Suss Realty, E971303, regarding 365 Apartments Corp., and E776836 regarding Sidney Kalikow.

EXHIBIT 1

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

400 BROOME STREET, NEW YORK, NY 10013

PUBLIC SERVICE COMMISSION

PETER A. BRADFORD
Chairman

HAROLD A. JERRY, JR.
GAIL GARFIELD SCHWARTZ
ELI M. NOAM
JAMES T. McFARLAND
EDWARD M. KRESKY
HENRY G. WILLIAMS



ROBERT A. SIMPSON
Acting Counsel

JOHN J. KELLNER
Secretary

August 11, 1987

Mr. Vincent DiCeglio
URAC Corporation
119 N. Park Avenue, Suite 409
Rockville Centre, NY 11570

Dear Mr. DiCeglio:

Your letter of July 28, 1987, to Denise Waxman regarding the subject of utility responsibility for service classification selection was referred to me.

The present tariff language regarding this subject, which requires the utility to assist the customer in the selection of the service classification has been variously interpreted over the years, but we believe that the elucidation of its meaning in a 1939 Commission decision, which I have enclosed for your information, best describes the scope of the respective responsibility of utilities and their customers in this area. The decision being made by staff on individual complaints adhere to this Commission interpretation. I suspect that you will share our view that it is a fair interpretation.

Thus, we do not believe that the clarification of the tariff you had requested is necessary.

You should also be interested to know that under the proposed nonresidential rules, which we expect will be enacted shortly, the utility's responsibility in this area is further "clarified" by a requirement that utilities provide information about service classifications to customers and obtain facts in the application relevant to service classification selection.

I hope this information adequately addresses your underlying concern.

Sincerely,

A handwritten signature in cursive script, appearing to read "Vilma Ellemberg".

Vilma Ellemberg
Assistant to the Director
Consumer Services Division