

STATE OF NEW YORK  
DEPARTMENT OF PUBLIC SERVICE

CASE 99-E-0508 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures --Appeal by Mr. Joseph Benesch of the Commission Determination in Favor of Niagara Mohawk Power Corporation, filed in C 26358 (972006)

COMMISSION DETERMINATION  
(Issued and Effective September 6, 2001)

This is an appeal by Mr. Joseph Benesch, the complainant, to the Commission from an informal hearing decision dated March 18, 1999, in favor of Niagara Mohawk Power Corporation (NMPC), the utility. The informal decision found that complainant was properly billed on the utility's small commercial rate, Service Classification (SC) No. 2, since March 1991, for service to a building in which he resided and also maintained a tackle shop.<sup>1</sup> For the reasons discussed below, we reverse the informal decision and grant the complainant's appeal.

BACKGROUND

Complainant maintains that he purchased the property on which the building in question is located in 1983; initially, he and his family resided for several years in a mobile home on the property; and in April 1990, complainant moved into the two-story permanent house he built (on the site previously occupied by the mobile home), which, in addition to serving as his residence, houses a bait and tackle shop;<sup>2</sup> the disputed account is for this building. There are two other buildings on the property whose combined electric service, at least since at April 1992, has been

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<sup>1</sup> The account whose service classification is disputed is No. 1538-3524-003-111-1.

<sup>2</sup> Informal Decision, p. 3.

separately metered and billed on SC No. 2;<sup>3</sup> these two buildings also apparently were billed at SC No. 2 prior to April 1992 under a different account held by complainant. Information in the file indicates that these two buildings have been used as a fish cleaning station and a bunkhouse, respectively.<sup>4</sup>

The disputed account was originally billed on the Residential and Farm Service Rate, SC No. 1, until March 1991. In March 1991, complainant made an inquiry to Department of Public Service regarding the appropriateness of the rate then being applied to his other account (that for the other two buildings on his property). By letter dated March 19, 1991, the utility both confirmed that SC No. 2 was correct for the other account, and stated that the building in which complainant says he resided and maintained the bait and tackle shop, then billed at SC No. 1, should also be billed at SC No. 2. The only information available about the basis for the utility's decision to change the billing of this account in 1991 is a handwritten report of a utility inspection of complainant's property on April 3, 1991, which states:

He [Mr. Benesch] volunteered to show me around his property. The nearer building is predominantly a store, storage rooms and guest rooms which are on the second floor.

He then took me to his cabin which he said was used by family members. However, the key tag prominently said 'Rental Cabin'. The cabin was small but had eight (8) bunks, a bath and a kitchen area.<sup>5</sup>

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<sup>3</sup> Service began to this account for the two other buildings, No. 1532-3524-004-459-1 on April 2, 1992. The two buildings were already receiving service at SC No. 2 in 1991, but not under this account number.

<sup>4</sup> Informal Decision, p. 4.

<sup>5</sup> An August 12, 1997 memorandum from the utility to a Department of Public Service staff member, responding to the current complaint indicates that the utility also did another investigation in mid-June of 1991, "which confirmed the original rate investigation findings."

Complainant began the current complaint proceeding in January 1997, when he again contacted NMPC concerning the propriety of the rates assigned to his accounts.<sup>6</sup> By letter dated January 18, 1997, complainant questioned the utility's charging him the nonresidential rate for the building in which he resides and also carries on what he characterized as a small seasonal business (the bait and tackle shop). By letter dated February 5, 1997, complainant submitted the dispute to the Office of Consumer Services (OCS, then referred to as the Consumer Services Division) of the Department of Public Service.

In a February 24, 1997 response by the utility to OCS staff, the utility first stated that "the issue of the appropriateness of the rate classification . . . has been in dispute since 1991, possibly earlier," and then said:

[I]f . . . [Mr. Benesch] can prove that he resides at the location in question and does not intend to operate a business that utilizes space of more than 50%, we will extend a residential rate to him. If the building is vacant and/or not used as a residence, he must remain on the current rate, which is not specifically a business rate.

According to an internal utility memorandum dated March 27, 1997, which was submitted by NMPC to OCS prior to the informal hearing, two utility representatives met with complainant and inspected his property on March 26, 1997. The memorandum briefly states the factual findings of the utility's investigation as follows: The dimensions of the two-story house were 28 by 52 feet, a total of 2,912 square feet; the second floor contained four bedrooms (three of which were noted as unoccupied except for "miscellaneous storage"), a living room with kitchen area, a full bathroom, and two half-baths. The first floor consisted of a 14 by 28-foot garage, and a 38 by

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<sup>6</sup> Apparently complainant first questioned the rate for account 1532-3524-004-459-1 (the fish cleaning station and bunkhouse) asserting that the these buildings were vacant and not used for business. The utility's response, dated January 10, 1997, stated that this account did not qualify for a residential rate.

28-foot tackle and bait shop, which was noted to be "closed for the season but full of inventory." There were "several small signs...attached to the front of the building," as well as road signs reading, "The Fish Butcher," "Lake Charters," "Lodging, Cable TV, Vacancy," "Sports World, Fish & Deer, and Taxidermy." There was a "large, asphalted [sic] parking area in front of the building." The memorandum also notes the existence on the property of the two other buildings whose service was billed, on a separate meter, at the SC NO. 2 rate. Of particular importance, the March 27, 1997 memorandum also states that, "the commercial operation appears to be exclusively run by Mr. Benesch and the one room area used by the commercial operation does not exceed 50% of the total cubical content of the building."

The memorandum, which does not state a conclusion about the proper rate for the building, then refers to "Electric Rate Bulletin No. 12, Combined Residential and Commercial Service," and states that this bulletin "interprets Special Provision A to be applicable only when the premises is 'primarily intended for residential purposes'." Also referring to the bulletin, the memorandum continues: "A commercial front building used jointly for commercial and residential purposes is not deemed to be 'primarily for residence purposes'." Copies of sketches by one of the utility representatives, as well as of photographs taken in October 1996, accompany the memorandum.

On April 9, 1997 and April 18, 1997, complainant contacted staff and asserted that, although a utility field investigation had confirmed that the building should be billed on the residential rate, the utility had taken no action to correct the billing. On April 21, 1997, the utility wrote to complainant stating:

Our inspection of your facility from Fall 1996/Spring 1997 and other visits . . . lead us to support our longstanding opinion that your facility is not primarily for residential use. Every indication is that for the majority of the year, the facility is used for commerce associated with the local area.<sup>7</sup>

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<sup>7</sup> The file contains copies of photographs that accompanied the letter.

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On April 25, 1997, complainant requested an informal hearing. Because a service application might have provided useful information, the hearing officer, prior to the informal hearing, asked NMPC whether it had obtained an application for service from Mr. Benesch. However, NMPC was unable to locate any such application. On August 13, 1997, the informal hearing was held. The hearing decision, issued on March 18, 1999, said that under Special Provision A of the utility's SC No. 1 tariff, in order to be eligible to receive service at the residential rate, it was necessary for complainant's premises to be primarily intended for residential use. The hearing officer concluded, based on the amount of space "devoted to commercial activity in relation to the residential space," the photographs of the exterior areas of the building, and the utility's inspection reports, that Mr. Benesch's account was properly billed on the small commercial rate, SC No. 2. In addition, the hearing officer rejected complainant's argument that he was entitled to the SC No. 1 rate on the basis that the tackle shop had been closed since November 1996. She noted that, given the continued presence of signage and inventory on the premises, there was insufficient evidence to establish that the business was closed permanently.

RELEVANT TARIFF PROVISIONS

The utility's tariff provides that Service Classification No. 1, Residential and Farm Service "is Applicable to Use of Service for:

Single phase residential purposes, in an individual residence and in an individual flat or individual apartment in a multiple family dwelling; residential purposes in a rooming house where not more than four rooms are available for rent; single phase service to religious bodies when required by law; and for single phase farm service when supplied through the farm residence meter.<sup>8</sup>

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<sup>8</sup> P.S.C. No. 207-Electricity, Leaf No. 78.

Special Provision A to the utility's SC No. 1 tariff states as follows:

Service under this Service Classification is primarily intended for residential customers residing in individual dwelling units.

1. When minor professional or commercial operations are conducted within the individual dwelling unit, service under this Service Classification will be permitted providing all of the following three qualifications are met:

- a. The minor professional or commercial operations must be exclusively by the residential customer residing at the individual dwelling unit served. Use of the professional or commercial area by another professional person or persons in addition to the resident disqualifies the electric service under this Service Classification.
- b. The area used by the minor professional or commercial operations does not exceed 50 percent of the total cubical content of the individual dwelling unit.
- c. Not more than two (2) rooms of any size are contained within the 50 percent cubical content of the area used for professional or commercial operations.

Residential customers having professional or commercial operations within an individual dwelling unit that do not meet all of the three qualifications must take service under the General Service Classification. Such customers, however, can elect to separate the electrical use between the residential area and the area used for professional or commercial operations and to have the Company set an additional meter. The meter used to measure the electrical use in the professional or commercial operations area will be billed under the General Service Classification.<sup>9</sup>

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<sup>9</sup> PSC No. 207, Leaf No. 79.

POINTS ON APPEAL

On appeal, complainant argues that the hearing officer's decision erred in the following respects:

(1) Complainant should be billed at the utility's residential rate for the building he uses both for a residence and a seasonal bait and tackle shop because his nonresidential use of the building does not exceed the limits set by Special Provision A of SC No. 1. He maintains that the utility's own documents show that he satisfies the tariff criteria, referring to the utility's March 27, 1997 memorandum. He asserts that the hearing officer misconstrued the signs the utility contended had marked the premises as commercial in nature, which he says referred principally to the two other commercial buildings on his property (whose commercial billing he does not dispute). He also argues that NMPC's tariff does not include such criteria as parking lot size (or the materials it is composed of) as determinative in establishing nonresidential use, pointing out, as well, that the lot has been cordoned off from public access. He also contends that, while he resides at the premises on a full-time basis, his business is open only during the summer months and for limited hours.

(2) The hearing officer confused his case with someone else's, citing the fact that the informal decision states that he said he had "home offices in the basement and a barber shop in the living room."<sup>10</sup> He submits ten photographs of the inside and outside of his home and property.

(3) Complainant asserts that his account had been billed on the residential rate until 1991 and that the utility's action in changing it to the commercial rate (SC No. 2) at that time was retaliation against him for running for public office against a personal friend of a utility supervisor.

The utility did not respond to complainant's appeal.

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<sup>10</sup> Informal Decision, p. 4.

DETERMINATION

The central issue in this matter is whether complainant's account for the building in which he resides is entitled to be billed on the utility's residential rate, SC No. 1. We conclude that the degree of nonresidential use at complainant's residence, as documented by the utility following complainant's January 1997 complaint, complied with the utility's limitations on such use at premises receiving the residential rate, and therefore the informal decision should be reversed.<sup>11</sup>

Special Provision A of SC No. 1 established three specific limitations on commercial or professional use of a dwelling served at SC No. 1: no involvement in the nonresidential activity by anyone other than the residential customer; no more than 50% of the "total cubical content" of the dwelling used for nonresidential purposes; and not more than two rooms used for the nonresidential operation.

The utility's position, as described in the informal decision, is not that complainant's building, in 1997, violated the three specific limitations established in Special Provision A on permissible nonresidential activity within a residence served at SC No. 1, but rather that the primary purpose of complainant's building was commercial, and, therefore, the fact that the building met the three specific criteria was irrelevant.

We do not find this approach to be warranted by the tariff language. The statement in the preliminary language of Special Provision A, that SC No. 1 is "primarily intended for residential customers residing in individual dwelling units" does not establish any test separate from the three specific limitations established in the Special Provision. The hearing officer refers to complainant's use of signs as justifying the conclusion that the building was primarily used for commercial purposes. However, the utility's tariff does not provide that use of signs or changes in the physical appearance of the

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<sup>11</sup> In view of this conclusion, there is no need to discuss complainant's second and third points on appeal.

building are circumstances precluding service at the residential rate.<sup>12</sup> In addition, two other buildings on complainant's property (a bunkhouse and a fish cleaning station) are nonresidential and are billed accordingly, and it is clear that many of the signs refer to them. We note that the utility's tariff does not preclude billing at SC No. 1 for a residence located adjacent to nonresidential buildings (separately metered) belonging to the same customer.

The utility's March 27, 1997 memorandum reporting on its investigation of complainant's case shows that complainant's house met the three limitations established by Special Provision A: First, no claim or showing is made that anyone but complainant is involved in the commercial activity (the bait and tackle shop) within his house. Second, the area within the house used for commercial purposes does not exceed 50% of the building's total cubical content (the utility provided measurements in terms of square feet although the tariff refers to cubical content); according to the utility, the residential space, consisting of the second floor and first floor garage, comprises 1,848 square feet, as opposed to 1,064 square feet for the tackle shop. Third, the area within the house used for commercial activity is only a single room, and, therefore, does not violate the requirement that no more than two rooms be devoted to the nonresidential use.

The utility's internal March 27, 1997 memorandum, suggests that the utility's eventual denial to complainant of the residential rate may have been based on its Electric Rate Bulletin No. 12. The memorandum says:

Electric Rate Bulletin No. 12, Combined Residential and Commercial Service, interprets Special Provision A to be applicable only when the premises is 'primarily

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<sup>12</sup> In contrast, under the tariff of Consolidated Edison Company of New York, Inc. (Con Edison) in order to continue to receive the residential rate where there is nonresidential use of a residence, "the non-residential activity . . . [must] not change the character or outward appearance of the Customer's residence." P.S.C. No. 9, Second Revised Leaf No. 207.

intended for residential purposes'. A commercial front building used jointly for commercial and residential purposes is not deemed to be 'primarily for residence purposes'.

The Bulletin's examples of "the type of service which is eligible for the residential rate under this rule," include "[o]ne or two room beauty parlors, dress shops, etc. maintained by the operators in their own homes . . . , [b]ut not if shared with other operators or in any case where more than two rooms are used," and "[r]adio and TV repair shops; handy-man service, etc. maintained by residential customers in garage or shop on their own residential premises."<sup>13</sup> The Bulletin also provides examples of circumstances where residential service is not available, including "[o]ne room delicatessens, bake shops, etc. in buildings with commercial fronts [because] . . . [a] commercial front building used jointly for commercial and residential purposes is not deemed to be 'primarily for residence purposes'."

Such informational bulletins are intended to provide guidance to utility staff in applying the utility's regulations. However, such guidance must be read together with the language of the tariff, which, unlike a bulletin, has the force of law.<sup>14</sup> Thus, while there are signs and a parking lot on complainant's property, the presence of such features does not, under the utility's tariff, have any effect on eligibility for the residential rate if the customer, as here, meets the specific and detailed provisions of Special Provision A. Similarly, there is nothing in the utility's tariff that defines a "commercial front building" or states that such a building cannot receive service

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<sup>13</sup> In connection with the current review of this case on appeal, the utility provided a copy of the bulletin to staff (a copy was also provided to complainant). NMPC informed staff, when it provided this document, that the bulletin (dated October 27, 1969) was in effect at the time of the utility's March 1997 response to the complainant, and that a subsequent revision made on April 14, 1997 made no substantive changes (apparently it eliminated gender-specific references).

<sup>14</sup> Purcell v. NY Central RR Co., 268 NY 164 (1935); Lee v. Con Edison, 98 Misc.2d 304, 413 NYS2d 826 (1<sup>st</sup> Dept 1978).

at a residential rate if it is occupied as a residence and meets the specific requirements of Special Provision A.

We note that NMPC's tariff is relatively lenient with respect to permissible nonresidential use of residential premises in allowing as much as 50% of the total cubical content of a residential dwelling to be used for commercial purposes;<sup>15</sup> in not making the presence of signs advertising the nonresidential activity a circumstance precluding SC No. 1 service;<sup>16</sup> and in permitting SC No. 1 service to include any amount of single-phase service provided to a farm associated with a residence, provided service is through a single meter.<sup>17</sup> In the absence of stricter limitations applicable to all NMPC residential customers on nonresidential activity at premises receiving residential service, there is no basis, under the circumstances documented here, for barring complainant from receiving the residential rate for the building in which he lives.<sup>18</sup>

We conclude that the utility's investigation of complainant's January 1997 complaint demonstrates that the disputed account, by that time, met the utility's criteria for SC No. 1 billing. On the other hand, the utility's documentation of complainant's 1991 complaint with respect to the same building suggests that the use of the building was different at that time, since complainant told the utility investigator that family members were living in the bunkhouse and the investigator did not

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<sup>15</sup> Con Edison limits the amount of space which may be used for nonresidential purposes without forcing billing for a residentially occupied unit onto a nonresidential rate to 25% and requires that no more than one room of a multi-room residence be reserved for the nonresidential activity. P.S.C. No. 9-Electricity, Second Revised Leaf No. 207.

<sup>16</sup> See note 12, supra.

<sup>17</sup> Apparently only one other major electric utility, Central Hudson Gas & Electric Corporation, permits the residential rate for farm use if it is metered together with use by a residence. See P.S.C. No. 15-Electricity, Leaf No. 164.

<sup>18</sup> Under the circumstances, we need not address complainant's assertions about the seasonal nature of his bait and tackle shop.

find any residential use by complainant at the building which the current complaint concerns.<sup>19</sup> Complainant did not challenge the utility's 1991 decision. Rather, in 1997, complainant made a similar complaint at a time when it appears that his use of the premises had changed. Under the circumstances, complainant is entitled to rebilling at SC No. 1 of the disputed account at SC No. 1 back to January 18, 1997, the date of his letter to the utility commencing the current complaint, and prospective billing of the account at SC No. 1.

In order to assure that all aspects of this case have been properly addressed, staff has thoroughly reviewed the complaint file. We determine that complainant is entitled under the utility's tariff to be billed at SC No. 1 rather than SC No. 2, and should be rebilled at SC No. 1 from January 18, 1997, with interest. The utility is directed to transfer the account to SC No. 1 and to carry out the rebilling and credit complainant accordingly and to notify the Director of OCS that this has been accomplished within 30 days of the date of this determination. Complainant's appeal is granted, and the hearing officer's decision is reversed.

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<sup>19</sup> See p. 2, supra.