

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 01-E-1050 - 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 Mrs. Basilisa Henriquez, filed in C 26358 (169107).

COMMISSION DETERMINATION
(Issued and Effective July 21, 2006)

Consolidated Edison Company of New York, Inc. (Con Edison or the utility) appeals to the Commission from an informal hearing decision dated May 9, 2001, and a reconsideration decision dated June 27, 2001, both in favor of Mrs. Basilisa Henriquez (complainant).¹ The informal decision (upheld on reconsideration by the hearing officer) limited the time period for which the utility could backbill complainant for unmetered electric service. For the reasons discussed below, we grant the utility's appeal.

BACKGROUND

1. Facts.

Since January 24, 1989, complainant has been the utility's sole customer for electric service at a building where she operates a deli and grocery store (on the first floor) and also resides (in an apartment on the second floor). She has both a demand-billed, nonresidential, "store" account and a "second-floor" account intended for service to her apartment (originally billed at a residential rate, but transferred to, and rebilled at, a nonresidential rate after October 17, 2000).

¹ Complainant is represented by an attorney, Matthew S. Dulberg, Rosenberg & Rosenberg, Jackson Heights, New York.

On October 17, 2000, the utility inspected the two meters and the store's electrical equipment² and concluded that (1) both the store and second-floor meters had been subject to tampering by means of repeated manipulation of each meter's dial hands, resulting in massive nonregistration of service,³ (2) the second-floor meter was providing service to five refrigerated cases in the store and to three refrigeration compressors (located in the basement) providing service to the store's equipment, and (3) tampering had occurred throughout the

² The utility's inspection report shows that the following equipment was receiving service from the store meter: one 8-foot by 6-foot soda/beer case, two 6-foot by 6-foot open juice refrigerators, two 6-foot by 4-foot cold-cut display cases, four 4-foot florescent lights, two mercury vapor 350 watts (outside), nine 8-foot florescent lights (basement), one 2-ton air-conditioning/heating ceiling unit, six black and white monitors, one slicing machine, one electric front door opener, one 13-foot by six-foot refrigerator, one 4-foot by 4-foot ice cream freezer, thirty-nine 8-foot florescent lights, two 2-foot florescent lights (basement), one 300 watt floodlight (outside), two 75-watt flood lights, one 19-inch-color television, six black and white cameras, one electric scale, and one electric overhead gate.

³ For the store meter, the utility's inspection report showed that: the brass tab seal, which secures the meter's glass cover in place, was missing; the Morse lock was not inserted properly into the Mattison lock; all five dial hands of the mechanical register (used for meter-reading and billing purposes) were "bent"; and the accumulated amount of usage represented by readings from this register did not correspond to the accumulated usage recorded by the meter's internal, electronic register. No problems were found with the meter's demand register. For the second-floor meter, the inspection report showed that: the dial hands of this meter's mechanical register were bent; the brass tab seal and the steel ring seal (the steel ring secures the meter to the meter pan and its seal prevents it from being removed) were both missing; and the bullet lock, steel ring and glass cover showed "signs of excessive removals."

preceding six-year period.⁴ As a result, the utility backbilled complainant on both accounts for a total of almost \$100,000, representing estimated unpaid charges for unmetered service over that period. Complainant was also billed for late payment charges and investigation fees on both accounts.⁵ Further, because the second-floor account had provided a substantial amount of nonresidential service it was ineligible for the residential rate and, therefore, the utility transferred the second-floor account to a nonresidential rate and also rebilled at a nonresidential rate. Service was terminated on October 17, 2000, pursuant to 16 NYCRR §13.3(a)(2), when complainant refused to pay any portion of the preliminary backbill. Complainant paid approximately half of the preliminary backbill (about \$48,000) on October 19, 2000, to obtain restoration of service.

2. Administrative Complaint Proceeding Prior to Appeal.

Mrs. Henriquez then complained to staff of the Department of Public Service's Office of Consumer Services, which upheld the backbilling. Complainant then requested and received an informal hearing. The informal hearing decision, issued May 9, 2001, upheld the utility's findings that unauthorized meter interference occurred on both of

⁴ Commission policy requires refunds by the utility to a customer of overpaid amounts for periods up to six years (see Case 26358, Complaint of Queens Jewish Center, Commission Determination [issued October 17, 1988]). Concomitantly, the maximum period of backbilling by a utility for underbilled service is six years. The Commission's regulations (16 NYCRR §13.3(c)) limit backbilling to shorter periods where a nonresidential customer neither knew nor should reasonably have known of the underbilling.

⁵ On January 3, 2001, the utility revised the backbilling slightly because of its recognition that regularly scheduled cycle meter readings of the store and second-floor meters on October 11, 2000, when compared to the final readings of these meters on October 17, 2000, indicated that no meter tampering had occurred during this six-day period.

complainant's meters, which resulted in unmetered service. The informal decision also found that comparisons of complainant's consumption during and after the unmetered service period on both meters, and similar comparisons of load factor for the store meter, supported a finding of unmetered service for the six-year period preceding October 17, 2000. Nevertheless, the informal decision limited backbilling of each account to periods of less than a year for the following reasons: the meters inspected by the utility on October 17, 2000, had been installed relatively recently (in February 2000, when the prior meters serving the account had to be replaced after a fire) and the hearing officer found that the prior store meter was tested on December 27, 1999, and the prior second-floor meter was tested on November 30, 1999. The hearing officer concluded that the utility, therefore, must have found during those tests that meter tampering had occurred on those earlier meters, but had failed to backbill for tampering within six months of these tests and was, therefore, barred under the Commission's regulations from backbilling each account for any period before the asserted testing date.⁶

The utility then sought reconsideration of the informal decision on the following basis: utility records showed that the November 30, 1999 and December 27, 1999 meter tests, believed by the hearing officer to be occasions when the utility must have become aware of tampering with meters serving complainant's accounts prior to February 7, 2000, were actually preinstallation tests (performed at the utility's facility) of the meters later installed on February 6, 2000, and could not have made the utility aware of tampering affecting the meters

⁶ Section 13.9(1)(b) states: "A utility shall not render a backbill more than six months after the utility actually became aware of the circumstance, error or condition that caused the underbilling [of a nonresidential gas, electric, or steam customer]."

removed from complainant's premises in January 2000. The utility also argued that Commission regulations and determinations showed that it was not precluded from backbilling for the full six years either because of those meter tests or because physical signs of meter interference were only shown with respect to the meters removed on October 17, 2000. The informal hearing officer denied reconsideration in a letter dated June 27, 2001, indicating that a longer backbilling period was precluded both because the utility must have known of earlier tampering with prior meters and because the utility had not provided physical evidence of tampering with the prior meters serving the store and second-floor accounts during the requested six-year backbilling period.

POINTS ON APPEAL

The utility appeals from the informal hearing and reconsideration decisions on grounds including the following:

(1) the informal hearing officer erred in concluding that the utility tested the store meter in service at the premises on December 27, 1999, and the second-floor meter then in service at the premises on November 30, 1999, when in fact each test was of a meter subsequently installed on February 7, 2000, to serve the specified account;

(2) the informal hearing officer incorrectly limited backbilling on the theory that the utility must have been aware of tampering earlier than it was; and

(3) the informal hearing officer, in her reconsideration decision, improperly found backbilling for the full six-year period to be precluded by lack of specific evidence of physical signs of tampering with meters serving complainant's accounts prior to February 7, 2000.

The complainant responds that: the informal hearing decision properly limited the backbilling, the informal hearing officer's decision is entitled to deference because it was based on a full hearing, the utility failed to specify grounds for

appeal as required by 16 NYCRR §12.13(b), and the utility should not be permitted to submit evidence for the first time on reconsideration or appeal (concerning what meters were tested on December 27, 1999 and January 7, 1999) when the informal hearing decision had relied on a different utility document contradictory to those later submitted by the utility. Complainant also submits reports dated April 30, 2001 and June 26, 2001, from complainant's consultant.

DETERMINATION

The issue on appeal is whether the informal hearing officer properly limited the utility's backbilling of complainant for unmetered service to periods of approximately ten months for the store account (from December 27, 1999 to October 17, 2000) and eight months for the second-floor account (from February 7, 2000 to October 17, 2000).

Complainant has not cross appealed from the informal hearing officer's decision that unmetered service was obtained through tampering with both the store and second-floor meters, nor does she challenge the utility's conclusions concerning the amount of unmetered service obtained. Those findings were amply supported by: (1) the utility's inspection reports for each meter detailing unambiguous physical signs of repeated accessing of the meters' inner workings and of dial-hand tampering (see notes 2 and 3, supra); (2) the utility's findings regarding the equipment being served by the store meter, and the equipment belonging to the store but being served by the second-floor meter (see page 2, supra); (3) usage records for both accounts showing consistent low levels of usage going back for the full six-year period (not sufficient for the needs of the electric equipment found being served on October 17, 2000, and inconsistent with the dramatic increase in usage on both meters

after elimination of the unmetered service conditions);⁷ and (4) load factor comparisons based on utility usage and demand records for the store account (the demand register for the store's meter was not found to have been subject to tampering) showing that the load factor for the account was consistently low, but increased dramatically after elimination of the unmetered service conditions.⁸

⁷ See Informal Hearing Decision, pp. 3-6, regarding usage by the store meter during the six years prior to October 17, 2000, or more accurately October 11, 2000. (As stated in note 5, supra, the high usage between a scheduled cycle meter reading on October 11, 2000, and the reading taken during the utility's October 17, 2000 inspection, indicates that no meter tampering occurred during this period.) Complainant's usage on the store meter after restoration of service following the October 17, 2000 inspection, as opposed to complainant's usage prior to October 11, 2000, and from October 1994 to February 7, 2000, strongly supported the conclusion that tampering occurred throughout the preceding six years. Moreover, complainant's usage on this meter after October 17, 2000, has remained high. For the second-floor meter, see Informal Hearing Decision, pp. 6-7, showing consistently low average daily usage before the meter replacement on February 7, 2000 (less than 8 kilowatt-hours [kWh] per day from December 1991 to December 15, 1998, less than 11 kWh from December 1998 to February 7, 2000), followed by much higher usage from February 7, 2000 to March 15, 2000 (average daily usage of 72.78 kWh), with diminishing usage in the next two months (average daily usage of 51.52 kWh from March 15, 2000 to April 13, 2000, and 21.93 kWh per day from April 13, 2000 to May 12, 2000), followed by usage below 9 kWh per day from May 12, 2000 to October 11, 2000. However, average daily usage was 234.67 kWh over the six-day period from October 11, 2000 (a cycle meter reading) to October 17, 2000 (when the utility read the meter during its unmetered service inspection)--as with the store meter, this pattern indicates that no tampering occurred from October 11, 2000 to October 17, 2000.

⁸ Load factor is the ratio of energy used during a billing period (i.e., consumption, expressed in kilowatt-hours) to the maximum rate at which energy is used by the customer's equipment during a billing period (i.e., demand, expressed in kilowatts). In complainant's case, the demand register of the store meter was not found to have been tampered with, and the dial-hand tampering with the consumption register (because there is no (continued)

This information would normally be entirely sufficient to support backbilling for a period of six years.⁹ However, during the six-year period in question, three successive meters recorded usage for complainant's store account, and two successive meters recorded usage for her second-floor account. As a result, the informal hearing decision found the utility was barred from backbilling for periods prior to dates on which the hearing officer believed in-service testing had been done of meters serving complainant's two accounts until their replacement on February 7, 2000. The hearing officer gave two

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indication that it affected the meter's gears) would not have affected the accuracy of the demand registration. Thus, if demand was accurately recorded and consumption readings were artificially low due to tampering, one would expect a lower load factor during the unmetered service period compared to a higher one afterwards. This borne out by the utility's records, which show that from October 13, 1994 to January 13, 2000, complainant's load factor averaged 11%. This was a fraction of complainant's average monthly load factor (approximately 70%) over the one-year period following the correction of the unmetered service condition. An average load factor of 11% was also inconsistent with the consumption that would have been expected from the refrigeration equipment found on October 17, 2000.

⁹ Section 13.9(c)(2) of 16 NYCRR permits backbilling of a nonresidential electric, gas, or steam customer for more than two years if the customer "knew or reasonably should have known that the original billing was incorrect" (see note 4, supra, regarding the maximum six-year limitation of backbilling). Dial-hand tampering requires regular manipulation of the inner workings of the meter, in violation of the customer's obligation, under the utility's tariff, "not to interfere or permit interference" with the meter and other utility property at the customer's premises, and responsibility for the safe keeping of such utility property (P.S.C. No. 9-Electricity, III. 11(C), Leaf No. 43). Tampering of this nature shows that complainant knew she was obtaining unmetered service. In addition, the quantity of unmetered service being obtained makes it reasonable to conclude that complainant knew she was being underbilled.

different rationales in the informal hearing and reconsideration decisions for this decision, both of which the utility has challenged. Below we consider the issues raised in relation to these two rationales, and then briefly address a few remaining issues related to complainant's response.

1. Whether the utility actually became aware of the unmetered service condition prior to February 7, 2000, and is barred from backbilling for periods prior to late 1999 when each meter then serving complainant was allegedly tested, because it failed to backbill within six months of such awareness.

Our regulations, 16 NYCRR 13.9(b)(1), state that a utility "shall not render a backbill more than six months after the utility actually became aware of the circumstance, error or condition that caused the underbilling, unless a court extends the time to render a backbill." The utility maintains that it first "actually became aware" of the unmetered service condition here on October 17, 2000, when it made its inspection.

The informal hearing officer's decision relies on her conclusion that the utility "actually became aware" of this condition earlier because the hearing officer concluded that on December 27, 1999 and on November 30, 1999, respectively, the utility tested the meters registering service to the store account and to the second-floor account prior to February 7, 2000. According to the informal hearing officer, these tests meant the utility "must" have been aware of tampering on the meter serving each account before February 7, 2000, and could not, therefore, backbill for any tampering prior to these dates since it did not backbill within six months of the tests. The informal hearing officer also implies that the utility "must" have known of meter tampering because it removed and replaced meters serving complainant during the six-year period for which backbilling is now sought.

However, §13.9(b)(1) requires actual awareness by a utility of meter tampering or other conditions causing underbilling as a basis for limiting the backbilling period, not merely a conclusion that some event indicates that a utility "must have been aware" of such a condition. Moreover, utility records show that the tests on November 30, 1999, and December 27, 2000, to which the hearing officer refers were, in fact, pre-installation tests of the replacement meters installed on February 7, 2000, to serve, respectively, the second-floor and store account. Thus, the meters tested were not the ones in service at complainant's premises on the test dates. Rather the meters tested were the same ones later installed on February 7, 2000 at complainant's premises, which were found on October 17, 2000, to have been tampered with. Review of print-outs of electronic utility records shows no indication of any tests or inspections performed on any electric meters while in service at complainant's premises prior to October 17, 2000. These records were supplied to the hearing officer by the utility in connection with the reconsideration request and the appeal.

We reject complainant's contention that the utility had no right to submit these records in connection with its request for reconsideration or on appeal. In response to the appeal, complainant contends that a two-page form, titled Unmetered Service Case Summary, which was filled out by a utility employee approximately two months after the unmetered service inspection on October 17, 2000, on December 27, 2000, supports the informal hearing officer's conclusions. (The December 27, 2000 utility form states that the store meter, which was removed in October 2000 because of tampering, was installed on July 11, 1995 and last tested December 27, 1999.) Without contending that the information on the form was accurate, complainant argues that because the hearing officer relied on it, the utility should not have been permitted, subsequent to the informal hearing, to submit additional

evidence to show the invalidity of the hearing officer's conclusion that the utility had tested a meter installed July 11, 1995, for the store account at complainant's premises on December 27, 1999, and must therefore have detected tampering at that time. We reject this argument. First, the informal complaint and hearing process is, indeed, informal, and aims (with success in the great majority of cases) at resolving cases before or during the informal hearing stage, and this process is not consistent with rigid limitations on what information may be presented following an informal hearing or review, in an application for reconsideration by the hearing officer¹⁰ or on appeal to the Commission, as opposed to during the informal hearing. Second, if the hearing officer did rely on the utility's December 27, 2000 document,¹¹ that reliance indicates a failure by the informal hearing officer to reconcile contradictory statements within her determination: the December 27, 2000 utility document stated that the store meter removed from the premises on October 17, 2000, was installed on July 11, 1995 and tested on December 27, 1999; that statement was inconsistent with the correct statement in the informal hearing decision (page 4) that "[t]he meter was exchanged on February 7, 2000 due to a fire at the premises." It was proper for the utility, under these circumstances, to

¹⁰ A hearing officer has discretion to consider a request from a party for reconsideration of an informal hearing or review decision. See Case 04-S-1096, Petition of URAC Corporation, Declaratory Ruling Concerning OCS Staff Authority to Remand Issues for Reconsideration (issued November 15, 2004), upheld, Matter of URAC Corp. v. PSC, Decision and Judgment, Index No. 9487218 (Sup. Ct., Albany Co., May 20, 2005).

¹¹ The informal hearing officer's statement about when the meter tested on December 27, 1999 was installed indicates that it is based on utility records, but does not specify what records are referred to. The case file provides no indication of what records were relied on.

seek reconsideration or to appeal and to submit additional evidence, in order to correct the informal hearing officer's misunderstanding of what meters were tested and when (in relation to installation), and it would be unreasonable, as well as inconsistent with past practice, to ignore the more reliable records submitted by the utility.¹²

Moreover, there is no evidence that the utility obtained actual knowledge of tampering as a result of its removal of the store and second-floor meters in January 2000, or removal of any earlier meters serving the accounts. The January 2000 removals were necessitated by a fire, which damaged complainant's electric equipment (connecting to the meters) and required replacement of that equipment as well as of the meters. There is no evidence of any finding by the utility at this time of tampering. Moreover, the circumstances--a fire requiring replacement of the meters and the customer's connecting electric facilities--would have impeded detection of tampering. In the case of the meter for complainant's second-floor account, there was no removal prior to January 2000 (the second-floor meter in use until the January 2000 fire had been in service since establishment of complainant's second-floor account in January 1989). There was a prior exchange of the store meter on July 11, 1995, which utility records show occurred because of damage to the meter--a cracked glass cover and a broken dial hand. Again, there is no information showing actual awareness by the utility, as a result of the July 11, 1995 meter exchange, of tampering with the store meter. Staff's experience is that meter covers are, on occasion, inadvertently broken and that

¹² The records submitted by the utility are routinely prepared business records, consisting of entries made at the time of the relevant events. They are more probative than the document on which complainant relies, which appears to be a garbled summary of the same computerized records submitted by the utility.

force sufficient to break a meter cover might also damage a dial hand; thus, the circumstances did not suggest a need to inspect the meter for tampering.¹³

Thus, the record fails to show that the utility had information earlier than the October 17, 2000 inspection that actually made it aware that an unmetered service condition was reducing registration of service by the store or second-floor meter.¹⁴

2. Whether the utility is barred from backbilling for periods prior to February 7, 2000, because it has not provided physical evidence of tampering affecting meters serving complainant's accounts prior to February 7, 2000.

¹³ The informal hearing decision reasonably rejected complainant's argument that meter readers should have detected tampering at the premises. The informal hearing decision (p. 9) states:

[D]ial hand interference can not readily be detected if the meter is observed head on, as a meter reader would look at the register. This was demonstrated at the informal hearing. It is only when the glass cover is removed and the view of the register is from the side that you are able to observe the eccentricities of the dial hands.

Meter readers have responsibility for reading meters accurately, but also quickly, which limits their ability to detect tampering. Moreover, someone engaged in meter tampering does not intend that tampering to be discovered and knows that meter readers will be looking at the meter. It is not surprising nor indicative of utility impropriety that an unmetered service condition may not be discovered by a meter reader.

¹⁴ The present case differs from Case 93-E-0754, Appeal by LILCO of the Informal Decision in Favor of Janoff and Olshan, Commission Determination (issued December 8, 1995), in which the Commission found the utility was, in fact, informed by the customer, on a particular date and in response to a utility inquiry, of information establishing the existence of a meter irregularity resulting in underbilling, but failed to backbill in a timely manner. In that case the utility had actual awareness of circumstances causing underbilling and was, under the circumstances, barred from backbilling for the period preceding the date it gained such actual awareness.

In her decision on reconsideration, the informal hearing officer stated an alternative rationale for her decision: backbilling for the full six-year period before discovery on October 17, 2000 of the unmetered service condition was precluded because there was no physical evidence of tampering specific to the two meters serving the store account before February 7, 2000, and the single earlier meter serving the second-floor account before February 7, 2000. This rationale relies on a prior Commission determination in Case 94-E-0466 (referred to as Lombardi).¹⁵

We conclude that Lombardi does not warrant the conclusion reached by the informal hearing officer in the present case. In Lombardi, the Commission noted that the only evidence of interference with the meter was "a few minor irregular conditions," which it characterized as "subtle and ... not necessarily indicative of an unmetered service condition"; the Commission emphasized that the conditions found in Lombardi "fall quite short of the physical evidence that is more typically presented in such cases ... [of] conditions [which] may be explained only by unauthorized human interference with the equipment."¹⁶ In the present case there is, indeed, compelling physical evidence of conditions on both the store and second-floor meter that can be explained only by human interference and there is metered usage information for both the store and second-floor accounts going back six years showing low usage throughout. This usage history is entirely inconsistent with the equipment found receiving service; it is also inconsistent with the much higher usage on the store meter after elimination of the unmetered service condition, and on the

¹⁵ Case 94-E-0466, Appeal by Con Edison of the Informal Decision Rendered in Favor of Nunzie Lombardi, Commission Determination (issued August 28, 1997).

¹⁶ Id., p. 6.

second-floor meter immediately after the unmetered service ceased being obtained. (Usage on the store meter has remained high subsequently, while usage on the second-floor meter went down significantly a couple months after elimination of the condition.)¹⁷ Thus, the scenario, in the present case differs significantly from that in Lombardi, which involved whether there was any sufficient proof that the customer's meter had been interfered with as claimed by the utility.

We conclude that the utility's October 2000 findings of objective physical signs of meter interference, together with confirming equipment survey and the evidence of extremely high usage from October 11, 2000 to October 17, 2000, compared to usage from February 7, 2000 to October 11, 2000 (see note 5, supra), constituted evidence supporting a conclusion that prior meters (measuring service before February 7, 2000) also were tampered with. This evidence was corroborated by utility records of usage recorded by those prior meters, which when compared to records for subsequent periods, showed complainant's usage and (for the store account) load factor for the period from October 1994 to January 17, 2000 (when service was disconnected because of a fire), were similar to what they were after February 7, 2000, but dramatically lower than after elimination of the unmetered service conditions. (We note, as well, the absence of any persuasive evidence showing an increase in complainant's load in February 2000.) This combination of evidence amply supports the conclusion that complainant tampered

¹⁷ In addition, extraordinarily high usage on both meters demonstrated by comparison of meter readings on October 11, 2000 (a regular cycle meter reading) and October 17, 2000 (the unmetered service inspection) indicates that dial-hand tampering did not occur during this period. This usage also supports the conclusion that the very low meter readings at other times reflected tampering.

with the meters serving her store and second-floor accounts throughout the six-year period for which rebilling was sought.

3. Complainant's remaining arguments in response to the appeal.

Complainant asserts that the informal hearing decision should not be reversed because it was based on a full and extensive hearing. As already stated, our complaint process, including the informal hearing or review, is informal. No evidentiary hearing subject to the sort of deference suggested was conducted.

Complainant also claims that the utility fails to adequately state grounds for appeal as required by 16 NYCRR §12.13(b) and objects in particular to the utility's statement (in the introductory portion of the appeal) that the hearing officer's limitation of backbilling was "inappropriate and inconsistent with the Commission's regulations" (page 2 of the appeal), as failing to state any error in the informal decision. Complainant appears to have ignored the detailed explanation under the heading Backbilling Regulations (pages 4 to 6 of the appeal) describing the nature of the informal hearing officer's error. The utility's appeal more than adequately states particular errors in the informal decision.

Finally, complainant submits a report dated April 30, 2001, from an electrical consultant in support of a claim that the utility's unmetered service estimate was excessive.¹⁸ In addition to arguing that no backbilling was permitted for periods prior to the February 7, 2000 replacement of meters due to the January 2000 fire for reasons addressed earlier in this determination, the April 30, 2001 report contends that complainant's electrical equipment was upgraded following the January 2000 fire and that usage prior to the fire (and prior to the installation of the new store meter on February 7, 2000),

¹⁸ Complainant also submits a June 26, 2001 report from the same consultant.

was lower than it was after that date because complainant was forced to alternate use of different types of equipment because of inadequate electric facilities. The June 26, 2001 report (see note 18, supra), apparently prepared in connection with the utility's request for reconsideration of the informal hearing decision issued May 9, 2001, merely reiterates that the hearing officer's limitations of the backbilling period were correct, and does not argue for any different backbilling methodology.

The consultant does not purport to have any personal knowledge of complainant's energy use prior to February 7, 2000, and provides no documentation to support his statements. It is because of complainant's interference with the meters at her building that the utility cannot have precise knowledge of what her actual use was. Under these circumstances, the utility must use the information available. Review of utility records in this case indicates that the utility's backbilling methodology was fair and reasonable given the available information.¹⁹ In addition, the backbilling of complainant's second-floor account at a nonresidential rate was appropriate because refrigeration compressors located in the building's basement and providing service to equipment in her store were receiving service through the second-floor meter.²⁰

¹⁹ The backbilling of the second-floor account was based on the average daily usage of 234 kWh per day recorded between October 11, 2000 and October 17, 2000 and a demand of 12 kilowatts. The backbilling of the store account was based on the average of the customer's load factor during two periods when it appeared that no tampering occurred, February 7, 2000 to February 14, 2000, and October 11, 2000 to October 17, 2000. Staff's experience is that load factor, or the relationship between a customer's energy use and its peak demand, is generally consistent, and, particularly since load factor takes into account seasonal variations in consumption, provides a reasonable way of estimating consumption.

²⁰ While service is available under Con Edison's residential service classification to a residential apartment for limited
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In order to assure that all aspects of this case have been properly addressed, a staff member has thoroughly reviewed the case file. We determine that the evidence supports the utility's findings of unmetered service and its backbilling estimates. Complainant should be aware that if her second-floor account is no longer providing service to equipment serving the store, she may request transfer back to a residential rate subject to a confirming utility inspection. For the reasons stated above, the utility's appeal is granted, and the informal hearing decision is reversed.

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nonresidential use of service within the dwelling (if relevant tariff restrictions are met), the residential rate is not available for service to an apartment and, in addition, to separately metered commercial premises at the same building. See P.S.C. No. 9-Electricity, SC No. 1, Applicability Provision (Leaf No. 201) and Special Provisions (Leaves Nos. 205-208).