

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 05-E-1133 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures--Appeal by Kaled Management of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., filed in C 26358 (502810)

COMMISSION DETERMINATION
(Issued and Effective January 29, 2008)

This is an appeal by Kaled Management (complainant)¹ from an informal review decision dated August 23, 2005, in favor of Consolidated Edison Company of New York, Inc. (Con Edison or the utility). The informal review officer found that no basis to require rebilling of complainant's two accounts at the lower residential rate where complainant had received information from the utility after initiation of service to each account that, among other things, explained the availability of the potentially more favorable residential rate if an employer was paying energy bills for an employee's residence. For the reasons discussed below, we uphold the informal review officer's decision and deny complainant's appeal.

BACKGROUND

1. Complaints, initial decision, and informal review decision.

This case involves two accounts, each for an apartment at a different multiple dwelling (both located in Queens), and each held by complainant, the owner or managing agent of the buildings. The accounts were originally established, one in March 2003, and one in July 2003, on Service Classification (SC) No. 2, the utility's small commercial rate. By separate letters dated December 13, 2004, complainant contacted the

¹ Complainant has been represented throughout this complaint by URAC Corp., a consulting firm.

utility requesting that each account be transferred to SC No. 1, effective the date service was established, on the basis that each account qualified for SC No. 1 from initiation of service. By separate letters dated January 12, 2005, Con Edison notified complainant that it had transferred each account to the utility's residential rate, SC No. 1, but refused to rebill the account at that rate from service commencement up to the date of transfer.²

By letter dated January 20, 2005, complainant then contacted the Department of Public Service's Office of Consumer Services (OCS) seeking rebilling at SC No. 1 for both accounts. The utility provided information to OCS showing that the application in each case was made by telephone and that Con Edison had sent each customer its "Welcome Package" for new nonresidential customers, which consists of a separate mailing (not a bill insert) containing a one-page letter and a brochure. The letter informed the customer that the account had been established at a nonresidential rate, and asked the customer to check the utility's information (stated in the letter) about its new account and to let the utility know "if there are any errors." The letter also told the customer:

To make sure you're on the correct rate, we've enclosed our non-residential rate brochure. Please be sure to read this brochure. It contains information about our most common rates and details tax exemptions, programs and rates that could help lower your bills if you qualify.

The brochure included the statement, under the heading

Residential Rates and Protections, that:

You may qualify for residential rates [EL 1, EL 7 (heating), GS 1, GS 3 (heating)] if: . . . As an

² The accounts in question are 25-5943-7535-0008-4 (established on April 29, 2003) and 25-2629-0940-0003-2 (established on July 28, 2003).

employer, you pay the energy bills for your employee's residence.

Entries in the utility's account records confirmed that for each account this material was mailed to complainant within a little over a month of the account's establishment.

In an initial decision dated, May 16, 2005, OCS found that both accounts had been properly established at SC No. 2, and until the accounts were transferred to SC No. 1, following notification to the utility of their use as the residences of building superintendents, billing at the nonresidential rate was proper and retroactive change in the rate was not warranted. Complainant then requested an informal hearing. Subsequently, with complainant's consent, an informal review was conducted.³ In a decision dated August 23, 2005, the informal review officer found no basis to require the utility to rebill complainant at SC No. 1 for either apartment. The decision noted that complainant failed to respond to a utility notice sent regarding each account that advised complainant of the rate at which it was being billed and of the potential availability of more favorable rates.

2. Con Edison's 1992 tariff change and subsequent changes in notification to nonresidential applicants and customers of rate options.

As discussed in our determinations in Case 06-E-0307⁴ (Kaled I), Case 99-E-0274⁵ (48th Street Owners Corp.), and

³ A customer who objects to Staff's initial decision on a complaint, has the choice of an informal hearing or review. An informal review is an alternative to an informal hearing in which both parties present their positions in writing to a review officer. See 16 NYCRR §§12.5 and 12.6.

⁴ Case 06-E-0307, et al., Appeal by Kaled Management, Commission Determination (issued October 19, 2007). Kaled Management (seeking rebilling of a different account than the two involved in the current case) was one of six complainants in this case.

Case 97-E-0928⁶ (500 West End Ave. Corp.), prior to October 23, 1992, the utility's tariff precluded provision of service at SC No. 1 to any customer other than the actual residential occupant of the premises.⁷ That tariff provision was revised, effective October 23, 1992, to state that SC No. 1 was applicable for "[l]ight, heat and power, when supplied directly by the Company to any building . . . or apartment . . . or portion thereof occupied as the home, residence or sleeping place of the Customer or an employee of the Customer" (emphasis added).⁸ This permitted building owners who held accounts for occupied superintendents' apartments to receive the residential rate for such accounts, subject to limitations on nonresidential use of premises billed at SC No. 1.⁹

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⁵ Case 99-E-0274, et. al., Appeal by 48th Street Owners Corp., Commission Determination (issued September 6, 2000).

⁶ Case 97-E-0928, et al., Appeal of the Informal Decision in Favor of 500 West End Ave. Corp. (issued March 14, 2001), rehearing denied, sub nomine, Case 99-E-0408, Appeal by Presbyterian Hospital/Phipps Houses, Commission Determination (issued November 14, 2001), Art. 78 petition dismissed, sub nom., Phipps Houses Services, Inc. v. PSC, slip op., Index No. 1868-02, Sup. Ct., Albany Co. (October 2, 1002).

⁷ P.S.C. No. 8-Electricity, Leaf 34.

⁸ P.S.C. No. 8-Electricity, 47th Revised Leaf 34. The current provision contains similar language. P.S.C. No. 9-Electricity, 4th Revised Leaf No. 201.

⁹ The tariff continues to limit permissible nonresidential use at premises billed under SC No. 1 as follows: (1) nonresidential use must not change the character of the premises; (2) such use must be performed only by the occupants of the apartment; and (3) such use must not take up more than 25% of the floor space and must not, in a multi-room residence, require more than one room to be reserved solely for the nonresidential use. P.S.C. No. 9-Electricity, SC No. 1, Special Provision B, 3rd Revised Leaf No. 207.

In the context of a rate case, the utility had agreed before the 1992 tariff change took effect to establish procedures for notifying SC No. 2 customers of the tariff change.¹⁰ Specifically, the utility agreed to send brochures to all SC No. 2 customers to notify them of the new availability of SC No. 1 to employers holding accounts for employees' residential apartments; thereafter, written information the utility provides (pursuant to 16 NYCRR §13.12(a)(2)) to new nonresidential applicants around the time of their application for service, and annually thereafter, would include notice of employers' rights to the residential rate for accounts held for employees' residential apartments. In addition, under this agreement, customers billed under SC No. 2 were to be given a six-month period from the date the rate changes were expected to take effect (July 1, 1992) to apply for service at the residential rate, with the right to retroactive SC No. 1 billing back to July 1, 1992. After January 1, 1993, however, nonresidential customers applying for the residential rate on the basis of the revised tariff would be entitled only to prospective billing at SC No. 1.

POINTS ON APPEAL

By submission dated August 29, 2005, complainant appeals from the informal review decision based on the arguments summarized below:

(1) As a result of its verbal application process Con Edison failed to adhere to the requirement of its tariff that it "endeavor to assist" complainant in obtaining a beneficial rate.¹¹ Con Edison's use of a verbal (rather than

¹⁰ Case 91-E-0462, Con Edison - Rates, Agreement and Settlement Concerning Revenue Allocation Issues (January 23, 1992).

¹¹ P.S.C. No. 9 - Electricity, First Revised Leaf No. 64.

written) application process results in improper rate assignment.

(2) The fact that rate information is provided subsequent to the original rate assignment (through the "Welcome Package" or through the annual nonresidential rights and responsibilities brochure) fails to fulfill the tariff requirement regarding assisting a customer in selecting a rate.

(3) The informal review officer ignored evidence--the lack of an "RPO" code in the service address--showing that complainant informed the utility that the apartment was going to be occupied by a superintendent.

(4) The informal review officer erred when she stated that "[t]he tariff does not exclude such account from receiving service under SC2 as well as SC1,"¹² because the utility's tariff (Special Provision A of SC No. 2) excludes superintendent-occupied apartments from being billed at the SC No. 2 rate.

By letter dated October 6, 2005, Con Edison responds to complainant's appeal. Regarding complainant's argument that the lack of a written service application process results in failure to assist the customer in the selection of the proper rate, the utility states that the Commission has previously determined that it was not necessary for Con Edison to obtain written service applications for superintendent-occupied apartments.¹³ The utility also argues, citing the determination

¹² Informal Review Decision, p. 5.

¹³ Case 91-E-0443, Appeal by Consolidated Edison Company of New York Inc. of the Informal Decision Rendered in Favor of Trump Towers Equitable and Stores 4,6,7,8 and 10, Commission Determination (issued October 26, 1992). In this case, the Commission agreed with the utility that requiring a written service application for commercial customers in every case would place an unnecessary burden on landlords, rental agents and the utility, and pointed out that regulations with respect to requiring written applications are permissive, not obligatory.

in Case 03-E-1276¹⁴ (Westchester ARC), that the Commission has already found that customers have a responsibility in the rate selection process to act on notices sent by the utility that provide information regarding the availability of potentially lower rates.

DETERMINATION

The central issue in this case is whether the owner or managing agent of two multiple dwellings is entitled to rebilling at Con Edison's residential rate of accounts for an apartment in each building for the period prior to the owner's notification to Con Edison that the apartment was occupied by a building superintendent. The arguments made by complainant in the current case are similar to ones we recently considered and rejected in Kaled 1, as well as in earlier determinations of other appeals seeking rebilling of superintendent's apartments at SC No. 1, 48th Street Owners Corp. and 500 West End Ave. Corp.

First, complainant argues that the utility's use of a verbal application process and its failure to take a written service application when a multiple dwelling requests service for an apartment in the building violate Con Edison's obligation under its tariff to "endeavor to assist" a customer in obtaining a beneficial rate. As we have stated in prior determinations (see note 6, supra), there is no requirement in our regulations

¹⁴ Case 03-E-1276, Appeal by Westchester ARC and Cerebral Palsy Association of New York State of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., Commission Determination (issued August 26, 2005), in which the Commission determined that, although Con Edison had initially failed to give proper notice to certain community residences of the availability to them of residential rates soon after a 1993 tariff amendment broadening eligibility for such rates, the utility's provision of subsequent annual nonresidential rights brochures to the customers "met the requirement of providing reasonable notification to complainants of their right to residential rates" and the customers' failure to act on that notice was their responsibility, not the utility's.

or Con Edison's tariff that applications by a multiple dwelling for electric service to an individual apartment be made in writing. Moreover, as stated in Case 99-E-0408, Appeal by Presbyterian Hospital/Phipps Houses, Commission Determination (issued November 14, 2001), such a requirement would be impractical given the large number of such applications from landlords and their managing agents.¹⁵

Second, complainant claims that the Welcome Package sent to it by Con Edison within slightly over a month of its application for service to each apartment, as well as the subsequent annual mailings to complainant of the utility's nonresidential rights and responsibility brochures, were irrelevant to the issue of whether Con Edison adequately assisted the customer in selecting a rate. Complainant is incorrect. Even before Con Edison started using its current Welcome Package, we had concluded in a series of determinations that language in the utility's annual nonresidential rights and responsibilities brochures after the 1992 tariff change was sufficient to notify customers of the availability of residential rates upon request where an employer was paying energy bills for an employee's apartment.¹⁶

¹⁵ A 2002 judicial decision dismissing an Article 78 petition challenging our determination denying rehearing in Presbyterian Hospital/Phipps Houses stated, in rejecting the argument that Con Edison should have obtained written applications from building owners for SC No. 2 service to apartments in their buildings, the Commission "rationally recognized that a written application would unduly burden both utilities and their customers." Phipps Houses Services v. PSC, slip op., p. 3.

¹⁶ See 48th Street Owners Corp., pp. 11-12; 500 West End Ave. Corp., p. 10. In addition, the appeal determination issued August 26, 2005, in Case 03-E-1276, Appeal by Westchester ARC and Cerebral Palsy Associations, affirms the adequacy of the annual nonresidential rights and responsibilities brochure

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In the current case, complainant was notified with respect to each account, first by the Welcome Package and subsequently by the annual nonresidential rights and responsibilities brochures for 2003 and 2004, of the availability of residential rates to employers paying energy bills for employees' apartments. The fact that a brochure was not provided at the time of each of complainant's two telephone applications did not render meaningless the utility's provision to complainant of the Welcome Package (following establishment of each account) and of the nonresidential rights brochure later in 2003 and again in 2004. We conclude, consistent with our past determinations on this issue, that complainant was placed on notice by its receipt of the Welcome Package, and again by the annual brochures, of the availability of the residential rate for the two accounts.

Third, complainant claims that the informal review officer ignored information complainant provided showing that it had advised Con Edison "of the occupancy by the superintendents." The purported information consists of an argument that "[w]hen Con Edison is advised that an apartment is going to be occupied they do not place the code 'RPO' (Renting Purposes Only) in the service address. They either place 'SUPT' or merely the apartment number."¹⁷ Complainant asserts that the utility did not put the code RPO in the service address in its records when the applications in this case were taken, but rather put the apartment number in, and that this proves that the applicant did inform the utility that a superintendent would be occupying the apartment.

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to put nonresidential customers on notice of their potential eligibility for the residential rate.

¹⁷ Complainant's appeal, p. 3.

However, as stated in Kaled 1, "the usage of codes like RPO in the utility's records is not prescribed or regulated by our regulations or the utility's tariff, but is a matter of the utility's convenience."¹⁸ Therefore, the significance that may be given to the utility's use of these codes is limited, and "the absence of RPO notations in relation to these accounts is not a basis for reaching a conclusion about what information was provided to the utility when the nonresidential rate was assigned."¹⁹ The absence of an RPO code in the utility's records at the time an application is taken is not an adequate basis for concluding that complainant informed the utility at the time of each application that the account was for an apartment then being used as residence of a building superintendent.²⁰ Moreover, even if a utility employee made an error initially, complainant was placed on notice by its bills and by the Welcome Package of the rate at which it was being billed and of the availability of the residential rate if the apartment was an employee's residence, and should have contacted the utility to request the residential rate.

Fourth, complainant is incorrect, as well, in claiming that the utility's tariff bars Con Edison from providing service to the two accounts under SC No. 2, if they

¹⁸ Kaled I, pp. 19-20.

¹⁹ Id.

²⁰ An OCS staff member's use of reasoning similar to complainant's as a basis for asking the utility to rebill an account in 1996 is irrelevant, since we have reached a contrary conclusion. Information indicating that Con Edison has granted other requests for rebilling of superintendents' apartments at SC No. 1 does not show the basis for the utility's conclusions, and, in any event, fails to show that the current complainant is entitled to relief.

could have qualified for SC No. 1. Complainant relies on Special Provision A of SC No. 2, which states, in part:

The Company's service and supply of electric energy under this Service Classification will not be furnished otherwise than directly to a Customer of the Company, solely through the Company's meter or meters, upon the individual application of such Customer upon the form of application prescribed in this Rate Schedule, and will be supplied on condition that such electric service is for the Customer's own use²¹

This provision does not preclude SC No 2. service to an apartment occupied as the residence of a superintendent.

When SC No. 1 was first made available to employers for energy accounts held for apartments occupied as the residences of employees it was made absolutely clear that the rate was available only after the employer informed Con Edison that the apartment was so occupied and that (except for a short period immediately following the tariff amendment in 1992) Con Edison had no obligation to rebill an account for any period before it received such notification. Furnishing service directly to a nonresidential customer's employee at the employer's premises, whether that service is used for residential or nonresidential purposes, is not a violation of Special Provision A's requirement that SC No. 2 service be provided directly to the nonresidential customer. The fact that SC No. 1 is also an available rate if the applicant or customer notifies the utility that the service is being used for an employee's residence, does not alter the availability of SC No. 2.

CONCLUSION

To assure that all aspects of this case have been properly addressed, the complaint file has been thoroughly reviewed. For the reasons stated above, we determine that

²¹ P.S.C. No. 9-Electricity, Leaf No. 214.

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complainant was properly billed at Con Edison's SC No. 2 for the two apartments at issue from the commencement of service until transfer of each account to SC No. 1 after complainant notified the utility that each apartment was occupied as the residence of a building superintendent. Therefore, we uphold the informal review officer's decision and deny complainant's appeal.