

Residential Electricity Submetering in New York

By:

Gerald A. Norlander, Esq.
Executive Director
Public Utility Law Project

Residential Electricity Submetering in New York
By
Gerald Norlander, Esq.

NYSBA Section on Business Law
Utility Committee Continuing Legal Education
October, 2009

The Early History of Submetering in New York

The practice of landlord remetering and resale of residential utility service to tenants, known as “submetering,” is longstanding. It existed as early as 1915, when New York Edison promoted submetering as a means to squelch potential competition from landlords who might otherwise bypass the utility system by installing their own small power plants.¹ The utility deterred the threat of bypass by selling master-metered utility service at a discounted bulk rate to landlords, allowing them to profit by submetering and marking up the price to the higher rate that the utility charged its own residential customers.

By 1929, however, the Edison companies opposed expansion of submetering to Brooklyn, Queens, and the Bronx. The sale of electricity by landlords led to many tenant complaints which surfaced in court decisions in the 1930's and in the press,² and prompted the

¹ “[T]he company . . . had been the actual instigator of submetering in 1915.” *Williams on Stand at Odds with Sloan - Submeters Aid Power Industry, Forestalling Private Plants, Says Former Edison Official*, New York Times, Jan. 12, 1929. “It is a practice that began some forty years ago in the city of New York, and was originally encouraged by utilities to meet competition from privately operated electric plants.” *Campo Corp. v. Feinberg*, 279 App. Div. 302, 303 (3d Dept. 1952) *affirmed* 303 N.Y. 995 (1952).

² “Another witness . . . called by Mr. Ransom, testified that he was overcharged \$10 one month by the Economy Electric Meter Company, a submetering concern, and that when he deducted the amount from his bill, the current was shut off from his apartment, and for two months, including the holiday season, he was without the service.” *Calls Submetering Costly to Patrons - Brooklyn Edison Counsel tells Utilities Board that System has Many Defects*, New York Times, Feb. 27, 1929.

PSC to call repeatedly for legislation.³ In rate proceedings during the 1930's the Edison companies intermittently sought to eliminate submetering, arguing that eliminating the practice would permit lower rates and end customer abuse.

The PSC never acted on complaints of submetered tenants in the 1930's and 1940's , taking the position that it lacked power to do so. Submetering is not mentioned in the Public Service Law. In private landlord-tenant litigation over charges for electric service in the 1930's, lower courts grappled with the question whether ordinary business corporations owning apartment buildings or operating submetering companies could lawfully provide any electric service to tenants outside the ambit of the Public Service Law, rejecting efforts of landlords to collect charges for utility service as rent.⁴ One court held:

a contract for the supplying of electric current by a corporation not subject to the regulation of the provisions of the Public Service Commission Law, is *ultra vires*, against public policy, and void.⁵

³ "In its annual report to Governor Lehman and the Legislature, the commission asserted that 'grave abuses' existed in the practices of many submetering companies which had 'continued to be a source of irritation to consumers as well as to the commission.'" *Again Asks to Curb Submetering Groups – State Public Service Board Urges Control to Protect Public*, N.Y. Times, Feb. 16, 1939.

⁴ *8284 Corporation v. Garey*, 137 Misc. 197, 242 N. Y. Supp. 413 (Munic. Ct. 1930) and *Owners & Tenants Electric Co. v. Trachtenberg*, 158 Misc. 677, 286 N.Y. Supp. 570 (Munic. Ct. 1936). A contemporaneous New York Times article indicated that the latter decision "is of such importance to companies furnishing electricity to occupants of large buildings that it will probably be carried to the highest court for final decision...." *Court Rules Out Submeter Claim: Judge Lewis Holds Concern Supplying Electricity Was Acting Unlawfully, Opinion May Be Appealed*, N.Y. Times, May 24, 1936. Apparently there was no appeal.

⁵ *8284 Corporation v. Garey, supra*, 137 Misc. at 198, 242 N. Y. Supp. at 415.

In numerous annual reports the PSC asked for new legislation,⁶ but apparently this was opposed and easily blocked by real estate interests. To this day, the appeals courts have never decided the issue of whether landlords can sell electric service, or whether the PSC has power to regulate them as electric companies under existing provisions of the law.⁷ One writer – who represented real estate interests – concluded in 1937 that submetering must be legal, because the utilities hadn't challenged it. After World War II, Con Edison filed a tariff prohibiting any resale of its service, and the PSC, after protracted administrative proceedings, and under a new Chairman, approved it in 1950, calling it "parasitic." As a result all residential electric submetering in Con Edison territory was ended. According to the New York Times:

[The PSC] directed a halt to the practice of submetering electricity, which has provoked thousands of complaints from New York City apartment dwellers over a period of a quarter of a century.... The commission acted by approving a request by the Consolidated Edison Company of New York.... The Commission had asked the legislature for years to give it jurisdiction over submeters. Such legislation was never passed, however. The commission had only the alternative of awaiting a request by a utility to stop the submetering system and thus halt the abuse involved. . . . It was

⁶ "For ten years, until 1949, the Public Service Commission backed a bill that would have given it jurisdiction over submetering charges. In 1950 Consolidated Edison filed a tariff with the commission asking permission to end residential submetering." *Submetering Case Brings a Dispute*, New York Times, April 27, 1952.

⁷ "It seems strange that a practice that has invited so much attention could attain such an extensive development over so long a period and apparently await a complete and conclusive and final determination by the higher courts of our jurisdiction. One must admit that the open, undisturbed, notorious pursuit of such business by a stock corporation may lend it an air of legality in the eye of the lay public. There is a natural hesitancy also to condemn a practice so long permitted and openly countenanced. However, in this field of the law adverse possession has not taken root." *Owners & Tenants Electric Co. v. Trachtenberg*, 158 Misc. 677, 679, 286 N.Y. Supp. 570, 572 (Mun. Ct. 1936).

estimated that some 250 submetering businesses would be forced to go out of business as a result of the commission's order.⁸

The order still reflected the PSC's traditional position that submeterers were outside the ambit of direct PSC jurisdiction. It accomplished the ban indirectly, by forbidding the utility from providing any residential service that is remetered or resold. Thus, any owner who submetered contrary to the tariff requirements could, in theory, be shut off by Con Edison. The Appellate Division, in a decision affirming the commission action to prohibit submetering, mentioned the PSC position that it lacked jurisdiction:

Despite these broad powers [under Sections §65 and § 66 of the Public Service Law], *the commission concedes that it has no jurisdiction over the activities of submeterers....*This gap in regulation presents a somewhat anomalous situation. The submeterer acts in effect as a public utility in selling current to his tenants, and yet is entirely free from regulation.

We reach the conclusion that it was within the regulatory power of the commission to direct the respondent company not to furnish electric energy otherwise than direct to consumers and through company meters. Nor did encouragement by predecessors of the respondent company of the practice of submetering, and tolerance thereof by the commission for some forty years, estop the latter from asserting its regulatory power. It could not be estopped from exercising its statutory authority to regulate the practices and rate classifications of public utilities....⁹

The Court of Appeals unanimously upheld the PSC order prohibiting submetering on the opinion of the Appellate Division.¹⁰ After *Campo v Feinberg*, *supra*, all gas and

⁸ *Resale of Power in City is Curbed - State Approves Bid by Utility to Deny Submetering Deals After Consumers' Pleas*, N.Y. Times, Dec. 29, 1950.

⁹ *Campo Corp. v. Feinberg*, *supra*, 279 App. Div. at 305 (*emphasis added*).

¹⁰ *Campo Corp. v. Feinberg*, 279 App. Div. 302, (3d Dept. 1952) *affirmed* 303 N.Y. 995 (1952). Apparently the PSC did not raise, and the court did not discuss, other provisions of the Public Service Law, which state that "the jurisdiction, supervision, powers and duties of the

electric utilities in the state were required by the PSC to adopt tariffs prohibiting the remetering or resale of electricity and gas. A regulation, 16 NYCRR Part 96, was also adopted, requiring all gas and electric utilities to adopt tariffs proscribing residential submetering.¹¹ As a result, for more than 25 years there was no residential electric submetering in New York. The stratagem of derivative control of submeterers through utility tariff restrictions allowed for different treatment of commercial submetering.¹² The approach eventually allowed for a complete policy reversal by the PSC, and reintroduction of residential submetering.

The Reintroduction of Submetering in 1979

During the 1970s, electricity prices began to increase faster than other expenses for apartment building owners. Owners again clamored for ways to shed their responsibility for master metered electric service, asserting that rent reductions accompanying this shift of responsibility could be small, because very large reductions in tenant energy usage would be achieved simply by converting to submetering.¹³ The PSC

public service commission shall extend ... "to the sale or distribution of ... electricity for light, heat or power.... PSL § 5.

¹¹ See N.Y. Times, July 27, 1951, *Home Submetering is Banned by P.S.C.*

¹² "By Orders dated November 14, 1979 and May 21, 1980 in Case 26998, the Commission relaxed its ban on submetering. With respect to new or renovated commercial properties or commercial properties that were master metered, the Commission requires the submission of individual proposals and prior approval for the installation of submeters outside of Consolidated Edison's service territory." PSC Case 00-E-0693 - *Petition of Sage Engineering Associates, LLP to Submeter Electricity at 194 Washington Avenue, Albany, New York, Located in the Territory of Niagara Mohawk Power Corporation, filed in C 26998.*

¹³ "Landlords contend that the 600,000 or so tenants in master-metered buildings in the city should be bearing a greater portion of spiraling electrical costs**** [claiming] 'the records of [Con Edison] show' that tenants on direct metering use 25 to 28 per cent less than those on master meters. But Con Ed says it has made no such study." *Landlords Pressing for Tenant Meters*, N.Y. Times, Feb. 16, 1975.

required individual apartment metering of electricity in all new buildings in 1976.¹⁴ Con Edison trumped, by proposing that the PSC require submetering of all master metered buildings:

Consolidated Edison has asked the New York State Public Service Commission to require landlords to collect electricity bills and read meters for 1.8 million residential customers in multiple dwellings.

It has proposed, specifically, that the commission lift its 25-year old ban on "submetering", a practice under which the utility sells electricity at wholesale prices to landlords, who in turn sell it at metered prices to tenants.

The Commission prohibited submetering in 1951 because of such abuses as unreasonable and discriminatory rates, excessive and inequitable deposit requirements, inaccurate meters and its lack of regulatory authority over such problems.¹⁵

An experimental submetering program in rental housing was announced in 1977,¹⁶ and in 1978, the Public Service Commission allowed submetering in cooperative and condominium housing projects, where the apartment owners also had ownership interests in the coops and condos.¹⁷ In such situations, the owners have the collective option to implement energy efficiency measures to reduce their monthly charges for usage, by upgrading insulation of the structure, heating systems and controls, and

¹⁴ "The commission disclosed yesterday that it intended to ban electrical service early this summer in any new building that lacked individual metering." *P.S.C. to Require Electric Meter for Each Tenant*, N.Y. Times April 25, 1976.

¹⁵ *Con Edison Seeks Right from P.S.C. to Require Landlords to Collect Electric Bills and Read Meters*, N.Y. Times, July 14, 1976.

¹⁶ *Tenants on Roosevelt I. To Test Individual Electric Metering Plan*, N.Y. Times Dec. 12, 1977.

¹⁷ *Opinion 78-18*, issued Aug. 23, 1978.

replacing inefficient major energy consuming appliances such as refrigerators and air conditioners.

In 1979, the PSC expanded submetering in rental housing, allowing it again on a case by case basis in response to landlord petitions.¹⁸ PSC regulations were modified to establish criteria for submetering applications, which include:

- personal notice to tenants of applications (in addition to publication of SAPA notices) and how they may comment to the Commission on the merits of their landlord's application;
- a requirement to provide for consumer protections consistent with the Home Energy Fair Practices Act after 1981;
- the method of rate calculation;
- a description of an appropriate rent reduction formula that accurately reflects the applicant's overall reduction in his total electric costs resulting from conversion to submetering;
- the method and basis for calculating rates to tenants, which shall include a maximum rate provision (rate cap) preventing charges to tenants from exceeding the utility's tariffed residential rate for direct metered service to such tenants;
- certification that the method of rate calculation, the rate cap, complaint procedures, tenant protections and the enforcement mechanism shall be incorporated in plain language into all leases governing submetered premises;

(The last item essentially requires creation of contractual arrangements with each tenant which incorporate rates, terms and conditions of service approved by the Commission.)

Rent Reduction Controversy in the Push to Submeter

In the 1990s, submetering was promoted vigorously by owners and submetering proponents as a way to advance competition by allowing landlords to avoid using energy

¹⁸ *Opinion 79-24, Opinion and Order on Submetering of Electricity and Gas*, issued Nov. 14, 1979, available at http://www.pulp.tc/Submetering_Opinion__79-24.pdf

from traditional utilities, by either producing it themselves or purchasing it from other sources, such as ESCOs. In addition, large energy conservation savings continued to be touted as a socially beneficial consequence of shifting bills to tenants for their usage.

A perceived regulatory obstacle in the mid-1990's was the lack of owner incentive to submeter rent controlled or rent stabilized properties, because rents are reduced when the landlord no longer includes electric service in the rent and charges separately for it. Owners who submeter in buildings subject to rent control, rent stabilization, or the Emergency Tenant Protection Act must obtain DHCR permission to submeter, and change the rents. Apparently at the urging of submetering proponents, DHCR, changed its methodology for submetering rent reductions – previously designed so as to prevent windfalls to owners – and adopted a new schedule of small rent reductions that were much less than the typical electric bills faced by tenants. As a result, a landlord could get rid of a large electric bill by installing submetering and billing the tenants, and give back a much smaller amount in tenant rent reductions.

Tenants sued DHCR, and its new schedule of rent reductions was invalidated due to a failure to follow the State Administrative Procedure Act and a failure to provide any “justification or explanation for its departure from its prior practice. . . .”¹⁹ Subsequently, another low schedule that also generated windfalls to owners was “validated” in a consultant’s report funded by NYSERDA and DHCR. To justify a low rent reduction, the report relied on low customer usage estimates, high estimates of conservation due to

¹⁹ *Car Barn Flats v. DHCR*, 184 Misc 2d 826, 833 (Sup. Ct. N.Y. Co. 2000).

the individual billing, and unrealistically low estimates of prices for electricity.²⁰ The report provided a sufficient basis for DHCR to abandon its prior submetering rent reduction methodology and the revised 2002 rent reduction schedule survived judicial scrutiny.²¹ The schedule was updated and increased slightly in 2008.²² The current rent reduction for a four room New York City apartment is \$46.99. Tenants on average pay considerably more – in in the range of 50% more – for the submetered electricity. This can have a major impact on tenants living on Social Security or other fixed incomes.

NYSERDA Subsidies and Promotion of Submetering

To encourage more submetering, the PSC approved the use of System Benefit Charge funds to generously subsidize building owners' costs to install submetering equipment. NYSEERDA also funded preparation and publication of a "Residential Submetering Manual," which urges landlords to attempt to circumvent the Home Energy Fair Practices Act by evicting tenants for unpaid electric charges, rather than by following HEFPA which provides for payment plans and other remedies. The Manual states:

New York State has extensive regulations in place to protect residents against their electric service being shut off. An owner seeking to continue the tenancy while discontinuing the service will most likely be required to comply with all tenant-protection regulations applicable to utilities for discontinuing the service. *These include various notice and payout requirements and protections for the elderly and disabled, which are time-*

²⁰ *Analysis of DHCR Rent Reductions for Conversion to Submetered Electricity*, PULP (2009), available at http://www.pulp.tc/052109_Analysis_of_DHCR_Rent_Reductions.pdf

²¹ *Car Barn Flats v. DHCR*, 27 A.D.3d 240 (App. Div. 1st Dept. 2006).

²² See *Update Number 1 to Operational Bulletin No. 2003-1*, DHCR, September 3, 2008, available at http://www.dhcr.state.ny.us/rent/operationalbulletins/orao20031_updated090308.htm

consuming, burdensome to the owner, and inconsistent with continuation of the rental tenancy. Moreover, special arrangements with respect to electric charges are likely to cause confusion in billing and collection procedures. As a result, owners may want to consider legal action for eviction of the resident or recovery of unpaid amounts as the primary enforcement mechanism for nonpayment of submetered electric charges.

Owners should focus on their lease to ensure that submetering charges can be collected, *including the availability of eviction for nonpayment of submetered electric charges.*

Where the lease agreement permits separate billing for electric charges based on consumption as read by a submeter, *collection of these charges should be available through a nonpayment-of-rent eviction proceeding.* If lease language is being modified, submetered electricity charges should be specifically defined as rent to avoid any issue about the availability of the nonpayment-of-rent eviction remedy.²³

Some courts view the issue differently, and refuse to allow eviction for nonpayment of “added rent” charges for electric service.²⁴ Some landlords, perhaps following the suggestions in the NYSERDA Manual, attempted to circumvent the HEFPA dispute resolution process by inserting arbitration of dispute language in their electric service lease riders, or by requiring court proceedings.

The Current Submetering Regime

After the 2002 amendments to HEFPA, and particularly PSL 53, the PSC amended its regulations to define submeterers as “utilities” under HEFPA. Efforts to

²³ *Residential Electrical Submetering Manual*, NYSERDA (1997, revised 2001).

²⁴ *Related Tiffany, L.P., v. Faust*, 191 Misc.2d 528 (App. T. 2d Dept. 2002).

divert complaints away from the PSC and into other forums have been rejected.²⁵ Issues have arisen involving the submetering regime. These include:

- Submetering for four years without any PSC Order approving submetering;²⁶
- Inadequate advance notice to tenants of submetering applications in violation of the submetering regulation;²⁷
- Inadequate notice to tenants of their right to comment on applications for submetering before they are granted;
- Submetering of electric heat, potentially displacing low income tenants in former Mitchell-Lama projects who cannot afford the charges for electricity;²⁸
- Eviction attempts based on nonpayment of electric charges claimed to be “added rent”;²⁹
- Overcharges for electric service, in violation of PSC-ordered rate cap;
- Court injunction sought by landlord to terminate service for nonpayment of disputed overcharges without HEFPA notices;³⁰

²⁵ See *Waterside Plaza, LLC v. NYPSC*, (Albany County Index No. 7654/05).

²⁶ Case 08-E-0389 – Petition of Riverstone Realty NE, LLC, to submeter electricity at One City Place, White Plains, New York, located in the territory of Consolidated Edison Company of New York, Inc., filed in C 26998, *Order Approving Submetering Plan* (Issued and Effective February 23, 2009), *petition for rehearing pending*.

²⁷ E.g., Case 06-β,-1237 - In the Matter of the Petition of Stellar Management on Behalf of Town House West LLC, to Submeter Electricity at 5 West 91st Street New York, New York Located in the Territory of Consolidated Edison Company of New York (Petition of Townhouse West Tenants Assn. (four days notice to tenants of application over Christmas weekend).

²⁸ CASE 08-E-0836, Petition of Frawley Plaza, LLC to submeter electricity at 1295 Fifth Avenue, 1309 Fifth Avenue and 1660 Madison Avenue, New York, New York; CASE 08-E-0837, Petition of Metro North Owners, LLC, to submeter electricity at 1940-1966 First Avenue and 420 102nd Street, New York, New York; CASE 08-E-0838, Petition of North Town Roosevelt, LLC, to submeter electricity at 510-580 Main Street, Roosevelt Island, New York; CASE 08-E-0839, Petition of KNW Apartments, LLC, to submeter electricity at 1890 Lexington Avenue and 1990 Lexington Avenue, New York, New York; *Order Denying in Part and Granting in Part Petitions for Rehearing and Establishing Further Requirements*, (Issued and Effective September 17, 2009).

²⁹ *Related Tiffany v Faust, supra*. (Numerous eviction cases brought for disputed electric charges without notice of HEFPA remedies and PSC complaint procedures).

- Circumvention of HEFPA;
- Unavailability of energy assistance for low income households;
- Time of use pricing imposed without consent;
- Crossed wires and inaccurate or defective meters;
- Excessive late charges;
- Cost responsibility for electric usage in energy inefficient buildings, where fixtures and appliances are owned by the landlord, shifted to tenants;
- Inadequate tenant education;
- Lack of SEQR assessment of impact of submetering on human environment;³¹
- Failure to comply with PSC orders before initiating charges to tenants;
- Failure to provide “shadow billing” in accordance with DHCR regulations;
- Failure to establish valid electric service agreements with tenants.

Conclusion

It is likely that there will be further refinement of the laws, rules, and orders affecting submetering. In 2008, the PSC initiated a proceeding to consider revision of its submetering regulations.³² A technical conference has been held and informal comments received by PSC staff. In June 2009, the PSC instructed NYSERDA to limit its grants for submetering to situations involving market rate rental apartments, cooperatives, and

³⁰ In the Matter of the Petition of Herbert E. Hirschfeld to Submeter Electricity at Hazel Towers, 1730-1740 Mulford Avenue, Bronx, New York, Case 00-E-1269 (\$20,000 overcharges in first year of submetering, informal hearing pending).

³¹ See *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363-364).

³² Case 08-M-1274, In the Matter of Reviewing and Amending the Electric Submetering Regulations, 16 NYCRR Part 96.

condominiums pending resolution of certain issues.³³ In its September 2009 decision halting submetering of heat in four large housing projects, the PSC indicated greater concern for the impact of its policies on tenants, and set out several criteria that would apply if the owner seeks in the future to implement submetering. In 2009, several bills were introduced in the state legislature to address submetering issues.

³³ Case 08-E-1132 - Petition of New York State Energy Research and Development Authority (NYSERDA) for Approval of an Energy Efficiency Portfolio Standard (EEPS) Energy Efficiency Program; Case 07-M-0548 – Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, *Order Approving Electric Energy Efficiency Programs with Modifications* (Issued and Effective June 24, 2009).