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Inside the World Of Residential Electricity Submetering

A source of energy and societal benefits nonetheless engenders conflict.

BY WILLIAM M. FLYNN
AND JOHN T. McMANUS

ELECTRICITY USAGE in residential apartment buildings can be metered in three ways: direct metering, master metering, and submetering. As a matter of general understanding, it is useful for property owners and tenants alike to be aware of the distinctions among them.

For property owners who are considering or presently using submetering in a residential apartment building, however, it is crucial to understand the applicable regulatory framework under the New York Public Service Law (PSL).

As demonstrated by recent proceedings before the New York State Public Service Commission (PSC or Commission) and complaints to its staff arm, the New York State Department of Public Service (DPS), ignorance or disregard of the

WILLIAM M. FLYNN, a member of Harris Beach and leader of the energy and telecommunications industry teams, is a former chairman of the New York State Public Service Commission and president of the New York State Energy Research and Development Authority. JOHN T. McMANUS is a member of the firm in the energy industry team and environmental law practice group. The authors represent the property owners in proceedings relating to the "Petitions of Frawley Plaza" matter discussed in this article.

applicable statutes and regulations can result in time-consuming and expensive tenant complaints as well as penalties and fines.

This article discusses the difference among the types of metering of electricity in residential apartment buildings, the benefits of submetering, its history in New York state, the regulatory framework, and some of the current legal issues.

In a direct-metered building, electricity is supplied to each apartment through a utility-owned meter.¹ Tenants receive an electric bill from the utility based upon actual usage at the utility's retail residential rate.²

In a master-metered building,³ the utility supplies electricity to the entire building through a utility-owned meter.⁴ Individual apartments are not metered, meaning actual consumption cannot be determined or used as a basis for billing electricity charges.⁵

Instead, the property owner pays the electric charges based on the building's master meter reading, with these costs generally being included in tenants' rent without regard to any individual tenant's electricity consumption.⁶ The building's electric charges are at the utility's commercial or bulk residential rate, which is typically significantly lower than the retail residential rate.⁷

In a submetered building, the building receives

electricity through a utility-owned master meter, but electricity use in each apartment is measured by a building-owned meter.⁸ The building owner then bills electric charges to tenants based on their actual consumption.⁹

Benefits of Submetering

According to a report published by the New York State Energy Research and Development Authority (NYSERDA),¹⁰ submetering "combines the best of both" master metering and direct metering.¹¹

Specifically, "[s]ubmetering permits the measurement of electric use in individual apartments via a building-owned meter that is installed for each apartment. The building continues to purchase its electricity on the less expensive commercial or bulk residential rate basis, but now the owner is able to bill electric to individual apartments on an actual consumption basis.

"The relationship between the building and the utility remains exactly the same as before. The building continues to receive one bill from the utility and the owner allocates the utility costs based on the usage recorded by the apartment submeters."¹²

NYSERDA has conducted a number of studies and demonstration projects that confirm the

short-term and long-term benefits of submetering electricity. These include energy savings, fair billing based upon individual usage, and environmental/societal gains.¹³

As to energy savings, one NYSERDA report notes “that the change from master-metering to submetering typically reduces the consumption of electricity in apartments by 10–26 percent.”¹⁴

As to environmental/societal gains, NYSERDA states that “[s]ubmetering benefits utilities and society in the same way: by reducing the waste of energy and deferring the need to site, build, or otherwise acquire electric generating capacity, as well as reduce the use of fossil fuels (e.g., oil), still the primary source of power generation in New York State. Reducing fossil fuel use is a giant step toward enhancing the environment by improving air quality. Decreasing our dependence on foreign oil clearly benefits all Americans.”¹⁵

The DPS has cited these benefits in various PSC proceedings. For example, in a recent case, DPS staff noted NYSERDA’s findings and stated that “[t]he installation of individual meters in living units within multi-dwelling buildings is one of the most energy efficient measures that a property owner can take to reduce energy costs while decreasing consumption through the efforts of the residents.”¹⁶

DPS staff members went on to note specific studies that “found that after the initial meter reading and monthly billing, residents in an individual submetered unit will reduce their electric consumption from 15 to 30 percent, dependent on usage patterns.”¹⁷ Consequently, DPS staff’s recommendation in that proceeding was to require “the installation of submeters in each individual living unit of residential multi-dwelling buildings, within four years of the Commission’s Order in this case.”¹⁸

A Brief New York History

In 1951, the PSC prohibited residential submetering due to certain “abuses.”¹⁹

Citing the need for energy conservation, the PSC considered submetering of electricity in privately-owned rental housing in 1979.²⁰ DPS staff, however, was against this step, warning of “practical difficulties in attempting to resolve disputes among a host of submeterers and their customers.”²¹

Ultimately, the PSC held that, “[w]ith regard to master metered residential buildings other than condominiums and cooperatives, we find that conversion to submetering may produce greater efficiency and equity in some instances. ... [W]e will consider individual applications for permission to convert from master metering to submetering in privately owned rental housing in Con Edison’s territory....”²²

The PSC held the same as to “new buildings or buildings that become completely vacated for some purpose such as renovation....”²³ The requirements that a property owner must satisfy for these “individual applications” to the PSC for residential submetering are set forth in 16 N.Y.C.R.R. §96.2.

The Regulatory Framework

Generally, a property owner may substitute one form of metering for another, subject to certain regulatory requirements.

For example, where a property owner seeks to substitute submetering for master metering, an application must be filed with the PSC pursuant to 16 N.Y.C.R.R. §96.2(b). That provision provides that “[s]ubmetering as a substitute for master-metering of private... entities providing electric service to residential rental units shall be permitted upon application by the prospective submeterer to the commission, which application shall contain” certain recitations, including:

“(1) a statement substantiating the economic advantages of submetering over direct utility metering;

(2) a description of the type of submetering system to be installed and a validation of its reliability and accuracy;

(3) 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;

(4) complaint procedures and tenant protections consistent with the Home Energy Fair Practices Act (Public Service Law, §§31-50; 16 N.Y.C.R.R. Parts 11 and 12);

(5) a procedure for notifying in writing all tenants of the proposal to submeter. The notification shall include a summary of the information provided to the commission under paragraphs (1) through (4) of this subdivision and an invitation to comment to the commission. The notification shall prominently display the address and telephone number of the nearest commission consumer services division office;

Property owners using or considering submetering in a residential apartment building **must understand** the applicable regulatory framework under the Public Service Law.

(6) a demonstration that an enforcement mechanism is available to the tenants to ensure that their rights are protected under the law (for government entities, the entity or another government agency may enforce the submetering provisions);

(7) 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; and

(8) 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.”²⁴

Following PSC permission to submeter electricity at a residential apartment building, the property owner is subject to the Home Energy Fair Practices Act (HEFPA).²⁵ Enacted in 1981, “HEFPA provides residential energy customers with comprehensive protections in areas such as application for service, customer billing, and payment and complaint procedures.”²⁶

In 2002, HEFPA was amended via the Energy Consumer Protection Act “to apply the same

consumer rights and protections to residential electric and natural gas customers of ESCOs and other energy entities as those afforded to utility consumers.”²⁷ Since then, the PSC has determined that a property owner that submeters electricity is an entity that “in any manner, sells or facilitates the sale or furnishing of... electricity to residential customers” under PSL §53, thus making submeterers subject to HEFPA.²⁸

HEFPA Compliance

HEFPA contains a number of important provisions with which property owners must comply once they begin submetering electricity.

For example, §11.4 sets forth the conditions, timing and process for terminating or disconnecting electric service.²⁹ Section 11.5 “provides special protections for specified residential customers regarding the termination, disconnection or suspension and restoration of utility service in cases involving medical emergencies, the elderly, blind or disabled, and terminations, disconnections or suspensions during periods of cold weather.”³⁰

Section 11.10 sets forth a utility’s obligations, tenant eligibility, required terms and form concerning deferred payment agreements, which are “written agreement[s] for the payment of outstanding charges over a specific period of time....”³¹ Section 11.11 states that “[e]very utility shall offer residential customers a voluntary budget billing or levelized payment plan for the payment of charges. The plan shall be designed to reduce fluctuations in customers’ bills due to seasonal patterns of consumption.”³²

Section 11.16 sets forth the requirements for the content of electric bills to tenants.³³ Section 11.17 requires property owners to provide tenants with an annual notification of certain rights under HEFPA, including, among other things,

“a description of the complaint-handling procedures available at the utility” and the PSC; “the rights and obligations of residential customers relating to payment of bills, termination, disconnection and suspension of service and reconnection of service;” and “a description of special protections afforded the elderly, blind and disabled; persons with medical emergencies; persons receiving public assistance, supplemental security income benefits or additional State payments; and persons in two-family dwellings.”³⁴

The procedure and timing for handling complaints by tenants to property owners is set forth in §11.20.³⁵

The PSC recently cautioned property owners concerning HEFPA violations.

Specifically, the PSC warned that it expects “submeterers to fully comply with all applicable PSC requirements and PSC rules and regulations, and that we have remedies at our disposal in the event of violations. Were a demonstration made that a submetering landlord was actually unable to comply with HEFPA through lack of capacity or inability to understand his or her obligations, or that the landlord was intentionally failing to comply or intentionally violating HEFPA’s provisions, we could order that remedial steps be taken, suspend or rescind the landlord’s authority to submeter, or seek a penalty from the landlord

based on non-compliance with our statute or regulations.”³⁶

A Sampling of Current Issues

Recently, proposed and existing conversions of residential apartment buildings from master metering to submetering have met with opposition from tenants and, in some instances, local elected officials.

This opposition has led to disputes before the PSC that have unsettled an area of the law that has been fairly static since the reintroduction of submetering in 1979. Some of these issues include the following.

Notice of Submetering to Tenants. Notice to tenants of a property owner’s intent to convert a residential apartment building from master metering to submeter is provided by the New York State Administrative Procedure Act (SAPA) and 16 N.Y.C.R.R. §96.2(b)(5).

Nevertheless, in a recent order, the PSC directed that certain additional notice be provided to tenants, including “the Case Number, Case Caption, nature of the petition, the SAPA comment period, a statement that tenants have the opportunity to provide comments during the relevant SAPA comment period, and information on how and by what date tenants may submit any comments to the Commission.”³⁷

Until the property owner submits an affidavit to the Secretary of the PSC confirming such notice, “no submetering petition will be approved.”³⁸

Electric Charges as “Additional Rent” Under Lease Agreements. Over decades, numerous PSC orders permitting submetering at residential apartment buildings have noted that the property owners intended to treat the electric charges to tenants as “additional rent” under the operative lease agreements.³⁹

One of the reasons why property owners sought to take this position was that it provided an additional remedy in the event of nonpayment of electric charges, namely, eviction.

In a recent order, however, the PSC stated, among other things, that “[w]hile a submeterer can, consistent with HEFPA, terminate electric service based on unpaid charges, there is no provision of HEFPA permitting the electricity supplier to evict the non-paying customer from their home.”⁴⁰

As a result, the PSC directed the property owners in those proceedings to “notify any tenants having such leases that, in no event, will such provisions provide the landlord with a basis on which to seek eviction. We further direct the Building Owners to exclude any such provisions from all future leases.”⁴¹

Muddling this issue further is a subsequent PSC order that did not apply this newly created “outright prohibition in the treatment of submetered electrical charges as rent.”⁴² Instead, the property owner was ordered, “in the event of non-payment of electric charges, to afford the tenant all notices and protections available to such tenant pursuant to HEFPA before any judicial action [e.g., an eviction proceeding] based in such non-payment is commenced.”⁴³

Petitions for Submetering in Electrically Heated Residential Apartment Buildings.

Section 96.2(b) of 16 N.Y.C.R.R. does not contain additional requirements for the content of petitions to submeter electricity depending on the subject building’s heating source.

Nevertheless, the PSC has issued an order stating that a property owner who petitions to submeter an electrically heated residential apartment building must “provide a complete record on submetering’s expected impact on tenants as a group and on any identified subset of tenants. The impacts should include a description of the access tenants will have to technology that will allow them to control the amount of electricity they use, as well as documentation of the energy efficiency measures that can be undertaken by the landlord in the building before submetering is implemented.”⁴⁴

Potential Changes to the Regulatory Framework for Submetering. In October 2008, the PSC opened a proceeding “to amend the Commission’s submetering regulations as they apply to both residential and nonresidential building owners, to improve the process by which customers convert direct, master-metered buildings into submetered service to individual residential and non-residential owners and tenants.”⁴⁵

An initial proposed set of amendments to Part 96 was issued at that time, but has not been adopted. In addition, a number of submetering-related bills have been introduced in the state Legislature.⁴⁶

To date, none of these proposed bills has been enacted. Counsel should remain vigilant, however, as this spate of potential new measures could significantly alter the legal landscape for submetering residential apartment buildings in New York.

Conclusion

For property owners who are considering or presently using submetering in a residential apartment building, it is essential to understand the regulatory framework that they are or will be subject to under the PSL.

Ignorance or disregard of the PSL and relevant implementing regulations, particularly the numerous, specific HEFPA requirements, can result in time-consuming and expensive tenant complaints to the DPS and penalties and fines from the PSC. As such, ensuring compliance at the outset and going forward can save property owners time and money in the future.



1. See New York State Energy Research and Development Authority, Residential Electrical Submetering Manual 1 (revised Oct. 2001) (NYSERDA Manual).

2. See id.

3. The practice of master metering new apartment buildings was banned by the PSC in 1976. See Opinion No. 79-24, Case 26998, *Proceeding on motion of the Commission as to rent inclusion and submetering*, Opinion and Order on Submetering of Electricity and Gas, at 3-5 (Nov. 14, 1979).

4. NYSERDA Manual at 1.

5. See id.

6. See id.

7. See id.

8. See id.

9. See id.

10. NYSERDA is a public benefit corporation whose “aim is to help New York meet its energy goals: reducing energy consumption, promoting the use of renewable energy sources,

and protecting the environment.” <http://www.nyserd.org/About/default.asp>.

11. NYSERDA Manual at 1.

12. Id. Notably, as part of a conversion from master metering to submetering, the rent of certain regulated housing is adjusted downward pursuant to formulas administered by the New York State Division of Housing and Community Renewal (DHCR) and the City of New York Department of Housing Preservation and Development (HPD). See http://www.dhcr.state.ny.us/rent/operationalbulletins/orao20031_updated090308.htm. These formulas establish the amount of the rent reduction based on, among other things, the number of bedrooms in the apartment.

13. NYSERDA Manual at 5-6.

14. Id. at 2.

15. Id. at 6.

16. Case 08-E-0539, *In the Matter of Consolidated Edison Co. of New York Inc.*, Prepared Testimony of Honor Marie Kennedy (Sept. 2008).

17. Id.

18. Id.

19. Opinion No. 79-24, Case 26998, *Proceeding on motion of the Commission as to rent inclusion and submetering*, Opinion and Order on Submetering of Electricity and Gas, at 3 (Nov. 14, 1979).

20. See id.

21. Id. at 7.

22. Id. at 10.

23. Id. at 14.

24. 16 N.Y.C.R.R. §96.2(b). Although the focus of this article is on the regulatory framework for submetering under the PSC, it bears mention that DHCR approval is also required for the conversion of a master-metered building to submetering where some or all of the apartments are rent stabilized or rent controlled under programs administered by the DHCR. See the DHCR’s “Owner’s Application for Termination of Rent Inclusion of Electricity (Direct Metering or Submetering of Rent Controlled & Rent Stabilized Apartments),” available at <http://www.dhcr.state.ny.us/Forms/Rent/ra70.pdf>.

25. See PSL §53.

26. <http://www.dps.state.ny.us/hefpa.htm>.

27. Id.

28. See, e.g., Cases 08-E-0836-0839, *Petitions of Frawley Plaza, LLC, et al.*, Order Denying in Part and Granting in Part Petitions for Rehearing and Establishing Further Requirements, at 29 (Sept. 17, 2009) (Frawley Rehearing Order). In addition to representing the property owners in these proceedings, the authors represent them in a subsequent pending proceeding commenced against the PSC pursuant to Article 78 of the Civil Practice Law and Rules.

29. See 16 N.Y.C.R.R. §11.4.

30. 16 N.Y.C.R.R. §11.5.

31. 16 N.Y.C.R.R. §11.10(a)(1).

32. 16 N.Y.C.R.R. §11.11(a).

33. See 16 N.Y.C.R.R. §11.16.

34. 16 N.Y.C.R.R. §11.17(a).

35. See 16 N.Y.C.R.R. §11.20. 16 N.Y.C.R.R. Part 12 governs complaint procedures where a tenant complains to the DPS, rather than the property owner.

36. *Frawley Rehearing Order* at 36.

37. Id. at 30-31.

38. Id. at 31.

39. See, e.g., Case 01-E-1290, *Petition of Ebbets Field Apartments Corp.* (Dec. 12, 2005).

40. *Frawley Rehearing Order* at 34.

41. Id. at 35. In terms of how a property owner could pursue a tenant for nonpayment of electric charges following this determination, the PSC stated that “landlords may pursue termination of electric service after following the notification requirements of HEFPA. Conventional legal debt collection measures may also be available to the landlord to recoup unpaid electricity charges.” Id.

42. Case 08-E-0439, *Petition of Riverview II*, Order on Reconsideration, at 27 (Feb. 18, 2010).

43. Id.

44. *Frawley Rehearing Order* at 28.

45. Case 08-M-1274, *In the Matter of Reviewing and Amending the Electric Submetering Regulations*, 16 N.Y.C.R.R. Part 96, filed in C 26998 (Oct. 2008).

46. See, e.g., A.7353/S.4748, A.7354-A/S.5063, A.7814/S.5009, A.7867/S.5252, A.7871-A/S.5383-A, A.9112/S.6351.