STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

COMMENTS OF THE NEW YORK LEGAL ASSISTANCE GROUP (NYLAG)

ON

Proposed Rulemaking and Petition of
Public Utility Law Project of New York, Inc.,
re. Consolidated Edison Company of
New York, Inc.'s Replevin Actions

Case No. 16-M-0501 —
Proposed Rulemaking PSC 39-16-00028

November 14, 2016

I. INTRODUCTION

The New York Legal Assistance Group ("NYLAG") respectfully submits these comments on the Public Service Commission's September 28, 2016 Rulemaking, I.D No. PSC 39-16-00028-P ("Rulemaking"). This Rulemaking arose from the July 11, 2016 petition submitted by the Public Utility Law Project of New York, Inc. ("PULP"), asking the Commission to review, and recommend changes to, the replevin acts and practices of Consolidated Edison Company of New York, Inc. ("Con Ed"). *See* Petition of the Public Utility Law Project of New York for an Order of the Public Service Commission Commencing a Proceeding to Consider Issues Pertaining to the Consolidated Edison Company of New York's Replevin Actions, Case 16-M-0501 (July 11, 2016) ("Petition" or "Pet."). PULP's Petition and the Rulemaking raise the following concerns regarding Con Ed's practices, among others: (1) whether Con Ed's practice of holding "voluntary" meetings in the courthouse gives customers the illusion that the meetings are court-sanctioned actions; (2) whether Con Ed's replevin practices violate the New York Civil Procedure Law and Rules, including C.P.L.R. § 7202; and (3) whether customer's rights under the Home Energy Fair Practices Act, 16 NYCRR §11 ("HEFPA") are respected during these proceedings.

NYLAG has conducted an investigation into Con Ed's replevin practices, based on interviews with defendants in these proceedings, review of relevant documents, and other sources. We submit these comments to express our serious concerns that Con Ed's practices are inconsistent with HEFPA, the C.P.L.R., and basic fairness concerns. NYLAG urges the Commission to require Con Ed to dramatically revise its practices, by, among other things, conducting its "voluntary" conferences outside state courthouses; appropriately advising replevin defendants of their rights under HEFPA; ascertaining whether defendants fall into HEFPA-protected groups and providing corresponding protections; providing fair, *written* deferred payments plans; conforming its replevin proceedings to the C.P.L.R.; and ensuring that defendants have timely access to judicial oversight. In addition, NYLAG supports PULP's request that the Commission provide financial compensation to individuals who have been subject to these practices in the past.

II. BASIS FOR NYLAG'S COMMENTS

NYLAG is a not-for-profit law office that provides free civil legal services to low-income New Yorkers who cannot afford private attorneys. NYLAG provides legal assistance to New York City's poor and near poor in the areas of consumer protection, government benefits, family law, immigration, disability rights, housing law, special education, and others. Several of NYLAG's Units have had experience with Con Ed's debt collection practices. NYLAG's Consumer Protection Unit ("CPU") represents and advises consumer debtors in debt collection lawsuits, and assists them in challenging abusive debt collection practices, combating identity theft, and repairing credit. The Volunteer Lawyer for the Day - Consumer Credit Project ("VLFD") provides limited-scope representation to pro se debtor-defendants in consumer credit actions. NYLAG's Storm Response Unit, launched in the immediate aftermath of Superstorm Sandy, provides comprehensive legal services to help victims of the storm deal with a range of legal issues, including issues related to termination of utilities. And NYLAG's Special Litigation Unit ("SLU") brings impact litigation to protect the rights of consumers and other low-income New Yorkers. SLU has substantial experience identifying systemic unlawful practices, including deceptive debt collection practices.

NYLAG's investigation into Con Ed's replevin practices was based on three types of interactions with Con Ed customers who have been defendants in these replevin proceedings. First, over the past several years, NYLAG has entered full representations in a small number of Con Ed replevin actions.[1] Second, NYLAG's CPU has provided advice and counsel to consumers who have contacted our intake line with concerns about Con Ed. And third, over the past approximately five months, attorneys and volunteers in VLFD and SLU have consulted with, and reviewed the documents of, dozens of clients before and after appearances at Con Ed's "voluntary" settlement conferences. In addition, NYLAG has spoken to various court personnel regarding Con Ed replevin proceedings. Finally, NYLAG reviewed the results of a FOIL request to the Commission comprising escalated residential customer complaints against Con Ed in New York City.

[1] *See* Pet. Ex. 1 (Testimony of Alfred Fuente, former NYLAG Attorney).

III. CONCERNS ABOUT CON ED'S PRACTICES

a. *Con Ed's "Voluntary" Settlement Conferences Confuse and Deceive Consumers*.

Con Ed's replevin actions risk confusing and deceiving consumers. *See* Pet. at 4. NYLAG's clients' experiences confirm that Con Ed follows a particular systematic procedure after a customer has failed to pay his or her bills, and has not responded to notices and letters seeking payment. First, Con Ed sends the customer a document entitled "Notice of Application," directing her to contact the court to obtain a "hearing" date or risk having her electricity turned off and her meters seized. This Notice has the appearance of a Summons and Complaint informing the Defendant that a legal proceeding has been initiated. The Notice further states:

> You have the right to a hearing before a Judge to explain any defenses you may have and to answer the enclosed affirmation which explains Consolidated Edison's claims against you. You will be required to be present at the hearing, and you will have an opportunity to refute the bill.

The Notice also tells the customer: "[Y]ou may, if you wish, discuss your account with a representative from Con Edison at an informal settlement conference. The informal settlement conference is voluntary."

When the defendant arrives at the window of the Clerk indicated on the Notice, however, he is not, in fact, given the choice whether to appear before a judge or schedule a voluntary conference. The only option provided is to pick a "hearing" date for the Con Ed settlement conference. When NYLAG inquired with Clerk's Office personnel in one borough several months ago, they confirmed that all defendants appearing in Con Ed replevin actions were simply assigned a voluntary conference date; they were not able to schedule an appearance before a judge, nor were they provided the opportunity to file an Answer containing any defenses or refuting the bill.

On the "hearing" date provided by the Clerk, the defendant appears inside a state courthouse. But the meeting that has been scheduled is not a court proceeding at all; it is a "voluntary conference" with a Con Ed representative, who sometimes is an attorney, and occasionally a second Con Ed employee.

Over the past five months, NYLAG has closely observed and spoken with many defendants waiting for their meetings with Con Ed. These meetings are held once per week, during a set time frame. In the Bronx, for example, every Thursday morning, defendants wait

outside a small room (503A) for the conference. This room is not a court room; it is adjacent to a courtroom and cannot be accessed by the general public. While waiting outside the room, defendants write their names on a legal pad and wait to be called to enter the room. Defendants have reported to NYLAG that the meeting is conducted only by Con Ed staff, without any court personnel present.

NYLAG's interviews revealed that many defendants did not understand the nature of the proceedings. For those who did understand that the Con Ed conferences were not sanctioned by the court, many did not understand that they had the ability to request judicial intervention, or appear before a judge. One customer reported that the Con Ed representative told him that he had the right to see a judge, but implied that it would not be "helpful" and that things would be worse if he did. Customers who wish to see a judge must take additional steps to secure a hearing date at another time. This poses a substantial burden on many customers, who already have been inconvenienced to attend, or try to attend, the "voluntary" conference.

In the Kings County courthouse, Con Ed meetings are scheduled to take place between 2:00 and 3:00 pm. One woman was told by the Court Clerk to arrive by 3:00 pm. Based on this and information in the Notice of Application, she took the day off from work and appeared at the room at 3:00 pm. But the Con Ed representatives had already left.

As to the substance of the meetings, defendants reported to NYLAG that during the meetings, the Con Ed representatives focused exclusively on having the defendant agree to make payments towards their arrears. Most were asked to pay whatever money they could during the meeting itself, and to agree to return on subsequent meeting dates to pay more going forward. The Con Ed representatives did not advise them about their substantive or procedural rights, nor did they present written payment agreements. As described further below, NYLAG believes that the payments Con Ed extracts during these conferences, and the payment plans they put in place going forward, are inconsistent with HEFPA.

NYLAG has also spoken to defendants who were further along in the replevin proceedings at the time they appeared for the conferences. For some defendants, Con Ed obtained a seizure order from the court, and provided it to a New York City marshal to execute. After being visited by the marshal, these defendants filed Orders to Show Cause ("OTSC") with the Court Clerk, seeking to halt the seizure. In non-Con Ed proceedings, the Court signs such

OTSCs and schedules a return date before a judge to consider the defendant's motion. In at least the Bronx, however (though not, we understand, in all boroughs), Con Ed defendants are scheduled to appear on the return date in the same room in which the voluntary conferences are held. On the return date, no judge is present in that room—just the Con Ed representative. As a result, many never receive judicial consideration of their defenses. NYLAG has attempted to learn more about the outcomes when defendants file OTSC challenging seizure orders. However, when we have attempted to request court files for these actions, we have been told that the Clerk's Office does not maintain such files in a way that can be requisitioned or reviewed.

PULP's Petition contends that the voluntary conference process "creates an illusion" for defendants that their meeting with the Con Ed representatives constitute formal legal proceedings in which their due process rights will be respected, when this is not, in fact, the case. *See* Petition at 5. Given the experiences of defendants with whom NYLAG has spoken, NYLAG agrees with this assessment. Many defendants are misled by the Notice of Application; do not understand the nature of the conference with the Con Ed representative; are not aware of their rights; and never have the opportunity to assert defenses before a judge.

b. New Civil Court Procedures and An Additional Letter Are Insufficient to Cure these Proceedings.

NYLAG understands that two developments since PULP filed its Petition bear on whether the Commission should pursue an investigation into Con Ed's current replevin practices: first, a Memorandum from the Chief Clerk of the Civil Court regarding utility meter replevin proceedings; and second, Con Ed's agreement to send customers a letter developed in partnership with PULP to provide information about rights and responsibilities. *See* Letter from Richard Berkley to Hon. Kathleen Burgess re. Case No. 16-M-0501/Matter No. 16-01387 (Oct. 21, 2016); Letter from Richard Berkley to Hon. Ben Wiles and Hon. Dakin Lecakes re. Case Nos. 16-E-0060, 16-G-0061 (Oct. 13, 2016); Joint Proposal in Case Nos. 16-E-0060, 16-G-0061, 15-E-0050, 16-E-0196 (September 19, 2016 ("Joint Proposal"). While both the revised Court procedures and the letter will help ameliorate the effects of Con Ed's practices, NYLAG does not believe they are sufficient to cure the profound flaws in these proceedings.

First, on July 20, 2016, Chief Clerk of the Civil Court Carol Alt issued a Memorandum amending the procedures previously established with regard to a utility company's filing of an

action for replevin. *See* NYC Civil Court: CCM-117-A (Eff. Date: August 15, 2016) ("Alt Memo"). Among other things, the Alt Memo provided that a Court Clerk would make an announcement before the start of Con Ed's voluntary informal conference "calendar" explaining that: (1) it is the defendant's option to meet with a Con Ed representative to discuss the allegations of a wrongfully held meter; and (2) the defendant's presence is not mandatory at the voluntary hearing, and he or she can request a hearing before the court.

In the Bronx, for example, this announcement has not been given regularly, if at all. We understand that it may be provided more regularly in other boroughs. It is NYLAG's view, however, that even if it is consistently provided, an announcement like this is not sufficient to counteract the other misleading elements of Con Ed's documentation and presentation to customers.

Second, as part of Con Ed's September 21, 2016 Joint Proposal, the Company agreed to send a letter developed in partnership with PULP to notify customers of their rights related to replevin actions. *See* Joint Proposal § L, Item 6 & App. 23. NYLAG applauds the letter and feels that, where it is received and understood, it will substantially help customers in understanding the nature of the proceedings and their rights. However, as with the announcement, we do not feel it does enough to undo the misimpressions created by Con Ed's "Notice of Application" and "voluntary" conferences held in state courthouses. As described further below, additional changes to Con Ed's practices are required.

c. Con Ed's "Hearings" Do Not Adequately Protect Customers' HEFPA Rights

HEFPA grants customers specific protections regarding the termination of utility services. *See* Pet. 7. Specifically, the statute provides that service cannot be terminated for customers to whose health or safety would be jeopardized by lack of power, including those with medical emergencies; residents who are elderly, blind, or disabled; residents who are using their Con Ed service to supply heat during the winter; and residents receiving public assistance. HEFPA §§ 11.4(a)(9), 11.5(c). HEFPA also requires Con Ed to offer customers a "fair and equitable" deferred payment plan, negotiated in good faith and tailored to the customers' financial circumstances; a customer showing evidence of financial hardship is entitled to a payment plan as low as $0 down payment and a monthly payment of $10. HEFPA § 11.10(a)(1). Payment plans must be *in writing*. *Id.*

PULP asserts that because the meetings are informal, there is no judicial oversight, and transcripts are not provided, there is no way to ascertain whether defendants are being informed of these rights. *See* Pet. 9. Based on NYLAG's investigation, we can say that defendants are *not*, in fact, being informed of these rights.

NYLAG spoke to many Con Ed defendants after their "voluntary conferences." All of them reported that the Con Ed representative did not ask them detailed questions to identify whether anyone in their household had a medical condition that required electrical service; was elderly, blind, or disabled; or received public assistance. Instead, Con Ed simply asked the customer what he or she could pay. Several Con Ed defendants NYLAG interviewed fell into one or more of these protected categories. One woman to whom NYLAG spoke had a son with serious asthma, but Con Ed never asked her about it, or whether, for example, her child would be in danger without an electrically-powered nebulizer. Other defendants to whom we spoke were individuals whose protected status should have been readily apparent from the person's physical appearance, but they were never asked relevant questions. In one case, NYLAG observed that a defendant's OTSC on its face indicated that protected persons resided in the household, but Con Ed continued to seek to terminate service.

Nor has NYLAG observed evidence that Con Ed is providing appropriate agreements to defendants experiencing financial hardship. NYLAG spoke recently to one defendant who, before entering his "voluntary conference," told us that his income was only a few hundred dollars a month. NYLAG advised him to ask Con Ed about a payment plan at the minimum $10-per-month amount. After the meeting, the defendant reported to us that he had asked about the minimum plan and the Con Ed representative told him such a thing did not exist.

In addition, NYLAG has observed that the pace of Con Ed's "voluntary conferences" does not abate during the winter months, when HEFPA limits Con Ed's ability to terminate service. Con Ed did not explain that limitation to any defendants to whom we spoke.

At least as disturbing is Con Ed's routine failure to reduce payment agreements to writing—a critical protection in HEFPA. Many defendants who appeared for their initial "voluntary" conferences reported to us that Con Ed had asked them what they could pay, and accepted a payment on the spot. Then Con Ed instructed them to return repeatedly to the courthouse on subsequent conference dates to make an additional payments in person. When

NYLAG staff consulted with defendants waiting outside the Con Ed room in the Kings County courthouse, most of the people to whom we spoke were not even there for the "voluntary" conference—they were there, following multiple other visits, to pay money to the Con Ed representatives. Others stated they intended to return and make payments at a later date. We understand that the payments made during the conferences can range from under $100 to thousands of dollars.

In some cases, Con Ed provided defendants a receipt memorializing the amount of the payment made during the meeting. But in others, defendants received no such receipt. Defendants appearing for their "voluntary" conferences uniformly were not offered, and had not executed written "Deferred Payment Agreements" ("DPAs"), as HEFPA requires.

NYLAG is aware that once defendants have filed OTSCs challenging seizure orders, they are sometimes offered written stipulations of settlement. But these are too little, too late, and do not accord individuals the protections guaranteed by HEFPA.

NYLAG's examination of the results of our FOIL request to the Commission, which sought escalated residential customer complaints in New York City, confirmed our understanding that Con Ed regularly fails to offer written payment plans. In at least one such complaint, a customer complained that he had an oral payment agreement with Con Ed that he wished to renegotiate. Unfortunately, rather than flag the issue as inappropriate conduct by Con Ed, the Commission representative who responded to the complaint told the customer he had broken the agreement.

Con Ed appears to use these "voluntary conferences" to extract payments, and promises of future payments, without complying with HEFPA. Indeed, the serial conferences are essentially a parallel repayment regime outside HEFPA's scope. Moreover, this entire process has been transpiring without transparency or oversight. NYLAG urges the Commission to require Con Ed to end this practice.

d. Con Ed's Replevin Cases Are Inconsistent with the C.P.L.R.

As PULP notes in its Petition, the C.P.L.R. distinguishes between replevin proceedings that are commenced "on notice" and those filed ex parte. *See* Pet. 10. Under C.P.L.R. § 7102 and Civil Court Directive 288, Con Ed is required to send notice to the consumer before applying to the Court for an order of seizure. *Only* under exceptional circumstances—where the meter is

in danger of being destroyed, a highly unlikely possibility—may the utility company submit an ex parte motion. In that event, however, the movant must meet the heightened requirements for the affidavit attached to the application. Specifically, it must establish that the meter is at risk of being destroyed. *See* C.P.L.R. § 7102(c)(7) ("[I]f the plaintiff is seeking seizure without notice, [it must present] facts sufficient to establish that it is probable that the chattel will become unavailable for seizure by reason or removal, concealment, or damage.").

The Petition noted PULP's confusion about whether Con Ed's motions have been, or should be, considered to have been filed on notice or ex parte. *See* Pet. at 10. PULP concluded that because Con Ed was not filing affidavits of service with the court—even if they were, in fact, serving notice on customers—the proceedings must be considered to be ex parte. However, Con Ed makes no attempt whatsoever to meet the heightened requirements for such motions.

NYLAG's investigation supports PULP's position. In June 2016, NYLAG employees spoke to a court clerk and a judge in Bronx Civil Court. Both the clerk and the judge confirmed that the court considers Con Ed's applications for orders of seizure to be ex parte. However, neither the clerk nor the judge was even aware of the legal requirements for considering such a motion ex parte—much less had they attempted to enforce those requirements.

NYLAG has never seen a Con Ed application for an order of seizure that attempted to comply with the heightened requirements. Indeed, in virtually no circumstance could Con Ed meet those requirements, because the Company could not articulate in good faith facts suggesting a risk that a meter would be removed or damaged.

The problem is not merely that Con Ed's replevin actions are not complying with the C.P.L.R.—it is that Con Ed is abusing the replevin process by invoking it at all. From all the evidence NYLAG has seen, it appears that Con Ed does not file these proceedings with the goal of obtaining replevin. Even if Con Ed were to prevail in the proceedings, the Company would be highly unlikely to actually seize a customer's meter, as it would require Con Ed employees to physically go to a customer's house and remove the meter—a costly, time-consuming, and potentially dangerous endeavor. And as PULP notes, if Con Ed were to actually seize a defendant's meter, it would pose significant threats to public safety, because removal of meters could result in customers using dangerous substitutes for power.

NYLAG believes that Con Ed initiates these proceedings *not* to seek replevin, but to

intimidate customers into making payments. Con Ed's Notice of Application suggests that Con Ed will imminently possess a legal order enabling the Company to forcibly shut off the defendant's electricity. Defendants appear for their "voluntary conferences" fearful for their families' health and safety if their meter were, in fact, to be seized. The conferences are held in a courthouse, giving the suggestion of legal imprimatur, but without any judicial oversight or due process protections. Instead, Con Ed—behind closed doors—uses the threat of seizure as leverage to push customers to make higher payments.

IV. CONCLUSION

Following NYLAG's investigation into Con Ed's replevin practices, we have concluded that Con Ed's actions violate HEFPA and the C.P.L.R., and exploit customers. Specifically, NYLAG urges the Commission to consider requiring Con Ed to reform its practices in the following ways.

First, NYLAG believes that Con Ed should not conduct "voluntary conferences" in state court facilities. Regardless of any disclosures provided to defendants, hosting a non-mandatory, non-legal proceeding inside a courthouse is unduly confusing and intimidating to customers.

Second, during any "voluntary conferences," wherever held, Con Ed representatives should be required to: (1) provide defendants with a "know your rights" handout, similar to the letter drafted in partnership with PULP, and also explain all rights orally; (2) ask specific, detailed questions to ascertain whether a defendant or a member of his or her household has a medical condition; is elderly, blind, or disabled; or is on public assistance. For example they should ask: "Will you or anyone in your household have a serious impairment to health or safety if electricity is terminated? Is there anyone with a medical issue inside the household? Is there a senior citizen living on the premises? Are there any children living on the premises?" Con Ed must then treat the defendant consistent with the protections required by HEFPA for those groups.

Third, Con Ed should not be permitted to initiate replevin actions between November 1 and April 15.

Fourth, Con Ed must uphold its obligation to offer fair deferred payment agreements. They must appropriately account for financial hardship, and *must* be in writing, as required by HEFPA.

Fifth, Con Ed should be required to conform its legal practices to the C.P.L.R. and the Alt Memo, by either commencing replevin proceedings with appropriate notice, and filing affidavits of service with the Court; or filing them ex parte but in compliance with the heightened standards applicable to such proceedings. Moreover, once Con Ed has initiated a replevin actions, those actions should be treated, by Con Ed and the courts, according to the procedures and requirements that apply to all other types of civil actions. Conferences in the actions should be held in a courtroom, before a judge. If "voluntary conferences" continue to be held inside courthouses, they should be integrated with the regular court calendar and called appropriately. A defendant should be able to see a judge at any time, without having to make an additional visit. And when a defendant has defenses to assert, he should be prompted to file an Answer, and should be provided with a model Answer specifically for utility cases.

Finally, independent of any prospective practice changes, Con Ed should be required to compensate customers whom it has been treating unlawfully and unfairly in years past.

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