

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on August 2, 2017

COMMISSIONERS PRESENT:

John B. Rhodes, Chair  
Gregg C. Sayre  
Diane X. Burman  
James S. Alesi

CASE 16-M-0501 - Petition of Public Utility Law Project of New York, Inc. for an Order of the Public Service Commission Commencing a Proceeding to Consider Issues Pertaining to Consolidated Edison Company of New York, Inc.'s Replevin Actions.

ORDER MODIFYING REPLEVIN ACTS AND PRACTICES

(Issued and Effective August 2, 2017)

BY THE COMMISSION:

INTRODUCTION

By petition filed July 11, 2016, the Public Utility Law Project of New York Inc. (PULP) requested that the Commission investigate civil replevin actions commenced by Consolidated Edison Company of New York, Inc. (Con Edison or the Company) against customers, whereby Con Edison seeks to seize meters in order to deny service for nonpayment of billing charges. The petition alleges that the Company's replevin actions are not designed or carried out in a manner that adequately protects customer rights and, therefore, such actions may be in violation of the Home Energy Fair Practices Act (HEFPA).

In this Order, the Commission finds no evidence of unlawful wrongdoing by the Company in its replevin actions nor did the Department of Public Service's (DPS) investigation identify facts warranting the provision of retrospective remedies. The Commission concludes, however, that additional measures are needed to improve transparency and accountability in the Company's replevin actions. Specifically, by this Order, the Commission directs the Company to implement modifications to customer service procedures for negotiation of deferred payment agreements (DPAs). Further, Con Edison shall commence the process for executing DPAs electronically (e-DPAs) and to modify its replevin process with respect to voluntary informal conferences (VICs). Until further notice, Con Edison shall also file quarterly reports on customer accounts that proceed to collection using the replevin process.

#### BACKGROUND

Replevin is a civil action used to recover possession of personal property that is wrongfully or unlawfully held.<sup>1</sup> Because Con Edison owns the meters used to measure energy usage, after non-payment of arrears the Company commences replevin actions in civil court as a means to terminate service by seizing the electric meter. Utilities may seize their meter when a customer is scheduled for termination and the Company cannot otherwise obtain access to lock the meter. Under civil rules, Con Edison is obligated to serve each customer who is a defendant in a civil replevin action with a notice of the Company's application for an Order of Seizure, together with a copy of a supporting affidavit. One of the required elements of

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<sup>1</sup> See New York Civil Practice Law and Rules (CPLR) Article 71, entitled "Recovery of Chattel." The CPLR refers to replevin orders as "Orders of Seizure."

the notice is that the customer may ask for a judicial hearing to dispute Con Edison's claims; the notice also must provide instructions for how to seek such a hearing.

When replevin actions are brought by the Company in Civil Court, the court may grant an Order of Seizure, upon Con Edison's submission of an affidavit providing support for the seizure and "upon [the court's] finding that it is probable the plaintiff will succeed on the merits . . ."<sup>2</sup> Once it obtains an Order of Seizure, Con Edison works with law enforcement to seize the meter. Pursuant to the Order of Seizure, law enforcement has the authority to "break open, enter, and search" customers' residences to take the meter.<sup>3</sup>

Replevin is, and should be, an extraordinary remedy that requires Con Edison's compliance both with civil law and the requirements of HEFPA regarding service termination. HEFPA requires that utilities take specific actions before termination of service, including issuing a final notice of termination as well as offering a DPA.<sup>4</sup> HEFPA also includes special procedural protections for customers with special needs, such as medical emergencies, customers who are elderly, blind or disabled, or recipients of public assistance. Utilities must also follow certain procedures during cold weather periods prior to service termination.

#### THE PETITION

PULP's petition raises a number of issues and concerns with respect to the Company's HEFPA compliance in the replevin

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<sup>2</sup> CPLR §7102(d)(1).

<sup>3</sup> Id.

<sup>4</sup> Only after a customer has broken a signed DPA may a utility proceed to terminate service.

process and whether the process complies with New York Civil Practice Law and Rules (CPLR) § 7102. In particular, PULP has concerns with how Con Edison conducts the VICs held in various civil courts in the Company's service territory.

Specifically, PULP expressed concern that the VICs are not supervised by the Commission nor by the courts and that no safeguards are in place at the VICs to ensure that customers receive required protections. PULP alleges that the VIC process gives the appearance that the Company is acting under color of law and that the VIC carries judicial authority. According to PULP, the Notice of Application Con Edison sends to customers advises the customer to call the Court Clerk to schedule a hearing. PULP states that when customers call the Court Clerk, they are given a date for a VIC with Company representatives and not a hearing before a judge, unless the customer specifically requests one.<sup>5</sup> Moreover, PULP alleges that the Company holds VICs in courtrooms, or in adjacent rooms within a courthouse, further lending the impression that the VIC carries judicial authority.

PULP is concerned that the environment of a VIC can coerce a customer to accept arrangements that are not in the customer's best interest and that customer remedies available through the PSC's Hotline are, in practical terms, not available.<sup>6</sup> PULP further argues that it is unlikely that the Company can make a good faith effort to reach HEFPA-compliant DPAs with customers that are tailored to the particular financial circumstances for each customer, as each VIC lasts

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<sup>5</sup> Petition of the Public Utility Law Project of New York for an Order of the Public Service Commission (PULP Petition), at 5.

<sup>6</sup> The PSC provides a toll-free Hotline that assists customers facing terminations of gas or electric service.

only a few minutes. PULP is also concerned about threats of service shut-off for customers with medical conditions.

PULP requested the Commission grant relief, where warranted, including but not limited to: requiring Con Edison to offer written and fully compliant DPAs before beginning replevin proceedings; requiring the Company to ensure that customers are adequately informed of their rights under HEFPA, and within the replevin proceedings, to oppose issuances of pre-judgment seizure orders; barring the Company from conducting replevins when special procedures during cold weather periods dictated in 16 NYCRR §11.5(c) apply; and, preventing the Company from conducting replevins of gas or electric meters without a formal judicial proceeding.

#### SUBSEQUENT EVENTS

Since the petition was filed, on August 15, 2016, the New York City Civil Courts issued a directive that applications for replevin orders abide by New York City Administrative Code, Article 4, § 400 (Chief Clerk's Memorandum). As such, Con Edison must obtain a separate Court Index Number for each replevin case the Company commences and must serve a Notice of Summons and Complaint on the defendant customer.<sup>7</sup> Further, by letter dated October 21, 2016, PULP advised that a provision of the Joint Proposal, filed in Con Edison's then pending rate case, which has since been adopted by the Commission, implemented a new Company practice whereby Con Edison would send a letter (developed in partnership with PULP) notifying customers of a potential replevin action against them and providing information as to the customers' rights and

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<sup>7</sup> A copy of the Chief Clerk's Memorandum, dated August 15, 2016, Class CCM-117-A, Category GP-60. Code §400 was enacted in 2006 is in Appendix A.

responsibilities.<sup>8</sup> Based on these developments since filing its petition, PULP believed it was unnecessary to seek prospective relief on the petition and that, instead, the Commission should order retrospective remedies for HEFPA violations.

A new Pre-Replevin Letter, developed by PULP and the Company in Case 16-E-0060, attached to PULP's October 21, 2016 letter, notifies customers of potential replevin action and provides information as to customers' rights and responsibilities.<sup>9</sup> The new letter is to be sent to customers 7 to 10 days prior to the initiation of any replevin action. According to PULP, this new communication reflects the new replevin process as described in the Chief Clerk's Memorandum, and substantially resolves PULP's replevin-related concerns on a going-forward basis. PULP asks, however, that the Commission turn its focus to review and assess retrospective remedies for what PULP sees as Con Edison's past violations of HEFPA.

CON EDISON REPLY

On November 15, 2016, Con Edison filed a reply to PULP's petition, seeking to have the petition dismissed. The Company advises that it only uses replevin actions as a last resort when all other means to resolve accounts in arrears have not succeeded. The Company states that it complies with all relevant Commission rules and regulations, as well Court rules and directives relative to replevin actions. Con Edison states that its compliance with HEFPA was recently confirmed in a

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<sup>8</sup> Case 16-E-0060, et al., Con Edison Electric and Gas Rates, Order Approving Electric and Gas Rate Plans (issued January 25, 2017).

<sup>9</sup> Case 16-E-0060, et al., supra. A copy of the letter is provided in Appendix B.

management audit.<sup>10</sup> Con Edison states that it provides a variety of notices to customers prior to initiating a replevin action, including bill reminder notices, disconnect notices, DPA offers, and notices of impending legal action. Many of the notices, Con Edison states, go above and beyond HEFPA requirements.<sup>11</sup> In addition to the CPLR requirements, Con Edison states that its replevin actions are governed by Civil Court Directive 288, dated March 19, 1974, and an agreement reached with the New York State Attorney General (Attorney General), dated February 24, 1983.<sup>12</sup>

Con Edison argues in support of VICs because, in Con Edison's view, customers obtain more advantageous results by participating in VICs rather than risking that the Court will issue an Order of Seizure when a settlement otherwise could have been reached. Con Edison states that the allegations in PULP's petition appear to stem from a single case before the Kings County Court, even though that matter was resolved without terminating service or removing the meter. As Con Edison explains, the attorney representing the customer in that case, as well as PULP, question the legal process related to replevin actions brought by the Company.<sup>13</sup>

Moreover, Con Edison states that, in response to the case PULP uses as an example, both the Attorney General's office and the court undertook separate reviews of the replevin

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<sup>10</sup> Case 14-M-0001, Comprehensive Management and Operations Audits of Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc.

<sup>11</sup> Con Edison Response at 6.

<sup>12</sup> The Company provided copies of both documents as attachments to its reply.

<sup>13</sup> Con Edison Response at 2.

process. Both reviews, in Con Edison's view, resulted in "minor" changes in the documentation and notices that Con Edison now provides to customers.<sup>14</sup> Specifically, in a letter agreement with the Attorney General dated May 26, 2015, the Company agreed to make certain changes to its Notice of Application. In addition, the City Court Chief Clerk's August 15, 2016 Memorandum directed changes to the court's process. Notwithstanding these changes, the Company argues that its basic procedures were upheld.

Con Edison's new procedures include that, as part of the Notice of Application, the Company is now required to provide an affidavit to the court confirming that all HEFPA requirements have been met. When the Company learns of new facts, it proceeds accordingly, including the cessation of the replevin action when appropriate.

#### NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on September 8, 2016 [SAPA No. 16-M-0501SP1]. The time for submission of comments pursuant to the Notice expired on November 14, 2016. The comments received are summarized below.

#### PARTY COMMENTS

##### New York Legal Assistance Group (NYLAG)

NYLAG requested that the Commission require the Company to: conduct VICs outside of Court facilities; advise defendant customers of their HEFPA consumer rights and protections; identify customers who are in HEFPA special

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<sup>14</sup> Con Edison Response at 3.

protection groups and provide corresponding protections; provide fair and written DPAs; ensure defendants have timely access to the judicial process; and provide financial compensation to customers subjected to past improper replevin practices.

According to NYLAG, defendants are not afforded the right to a hearing before a judge nor are they granted an informal settlement conference as described in the Notice of Application. In NYLAG's experience, a "hearing" date is scheduled by the Court Clerk, but serves as the date of the VIC in a room with Company representatives only and, reportedly, with no court staff present. Therefore, defendants have been confused over the nature of the VIC, their ability to request judicial intervention, and their right to appear before a judge. Each court facility schedules VICs once a week on a specific date within a specific timeframe. NYLAG asserts that since the VICs are non-mandatory and non-legal, they should not be held at court facilities.<sup>15</sup>

Based on NYLAG's observation, defendants who participate in VICs are not provided disclosure of their HEFPA protections related to termination. Nor does Con Edison ask whether the defendant or another resident at the defendant's premises qualifies for any of the HEFPA exemptions from service termination that are intended to avoid jeopardizing health and safety (i.e., special needs, medical emergencies, energy supply for heating, or public assistance recipients).

NYLAG recommends a requirement that Company representatives provide a written HEFPA "know your rights" handout along with an oral explanation of HEFPA and that it ask specific questions to determine whether the defendant or another resident at the premises is a member of HEFPA special

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<sup>15</sup> NYLAG at 11.

protections customer groups. NYLAG also recommends the Commission disallow replevin actions during HEFPA's cold weather period, from November 1 to April 15.

NYLAG notes that VICs focus on reaching agreements with defendants to make payments on arrearages and sometimes include that customers return to court on subsequent dates with additional payments. NYLAG observed that written payment agreements were often not offered or provided during the VICs. Defendant customers also did not routinely receive receipts to document the payments made during the voluntary conference. NYLAG observed that Con Edison had not routinely advised defendant customers about HEFPA provisions requiring DPAs based on defendant customers' financial needs, including that the minimum DPA allowed under HEFPA is \$0 down payment and \$10 monthly payments.

Assembly Member Richard H. Gottfried, New York State Assembly

Assembly Member Gottfried contends that Company representatives do not afford customers HEFPA procedures and consumer protections in replevin actions. Assembly Member Gottfried suggests that Company representatives be required to provide defendant customers written notice of their rights under HEFPA and provide written documentation that identifies customers who are in HEFPA special protection groups. The Assembly Member concurs with NYLAG's concern that neither formal DPAs nor the special customer protections regarding service terminations are offered. The Assembly Member also recommends the discontinuance of the practice of holding VICs in the courts and that Con Edison be required to provide written documentation of all payment agreements to customers.

LEGAL AUTHORITY

Pursuant to Public Service Law §65(1), the Public Service Commission has statutory authority to ensure that utility service is safe and adequate and in all respects just and reasonable. More specifically, the Commission administers and enforces the requirements of HEFPA, which applies to the "provision of all or any part of the gas, electric or steam service provided to any residential customer by any gas, electric or steam . . . corporation."<sup>16</sup> HEFPA's statutory and regulatory provisions require that customers whose utility service charges are in arrears receive extensive notice of possible termination as well as an offer of a written DPA that is "tailored to the customer's financial circumstances."<sup>17</sup> Further, a "deferred payment agreement (also referred to as the agreement in this section) is a written agreement for the payment of outstanding charges over a specific period of time, signed by both the utility and the customer or applicant."<sup>18</sup> Service termination may not occur until a DPA has been offered and refused or until a customer accepts and then defaults on such agreement.

STAFF INVESTIGATION

Staff conducted an investigation into the Company's replevin process and related practices. The investigation included on-site observations of VICs, assessment of the customer service procedures through Con Edison's Customer Information System (CSS), review of replevin complaints filed with DPS, review of Con Edison accounts which were in the

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<sup>16</sup> Public Service Law §30.

<sup>17</sup> 16 NYCRR 11.10(a) (1).

<sup>18</sup> 16 NYCRR 11.10(a) (4).

replevin process, and review of the Company's practices associated with DPAs.

Due to the Chief Clerk's August 15, 2016 memorandum, and the new Company practice developed in its recent rate case, Con Edison's replevin procedures underwent changes shortly after Staff began its investigation. As a result, much of Staff's investigation and observations reflect the modified practices, and not the procedures that were the subject of PULP's petition; however, Staff also reviewed past replevin cases in addition to past PSC complaints about replevin, in order to consider whether retrospective remedies were appropriate.

Review of Department of Public Service (DPS) Replevin Complaints

Staff reviewed 110 DPS complaints about replevin that had been filed by Con Edison customers between January 2014 and August 2016. Staff's review focused on Con Edison's treatment of customer accounts prior to reaching the point where replevin was required, particularly whether customers were offered legally sufficient DPAs as a means to pay their bills and avoid termination.

The Company initiates its collection process by mailing to the customer a standard DPA offer with a disconnection notice. These practices comply with HEFPA.<sup>19</sup>

Many customers who filed DPS complaints reported that the Company offered oral DPAs when financial assessments were conducted by telephone, and that the customer had not received a written DPA in the mail. Subsequently, at Staff's request, the Company provided copies of available written DPAs that were mailed out to those specific customers. Citing constraints in its Customer Service System (CSS), the Company was unable to provide copies of all of the requested DPAs.

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<sup>19</sup> 16 NYCRR 11.4.

In many instances in which the Company had provided documentation that a DPA offer was mailed to a customer, the customer had not returned a signed agreement. Staff's review of replevin-related complaints in the Company's CSS found that there were inconsistencies in the account records with respect to the documentation of DPAs. In some instances, the customer service representatives (CSR) noted that the proposed terms of a DPA were provided orally or by mail to the customer. In other instances, no record of a DPA was included in the account record. If provided by mail, the Company was able to provide only proof of postage.

Con Edison Replevin Accounts

At Staff's request, Con Edison provided a database of residential and commercial accounts where replevin notices had been sent between January 1, 2014 and August 9, 2016 (Con Edison database accounts). Staff then selected a random sample of residential accounts from each borough and Westchester County, based on the percentage of replevin notices sent in each.<sup>20</sup> Staff also reviewed these accounts for Con Edison's actions leading up to commencement of the replevin action.

Staff found that Con Edison routinely offered multiple DPAs to customers, often going beyond the minimum requirements of HEFPA. Most of the DPAs were negotiated by telephone, with written agreements sent in the mail for the customer to sign and return. As with the DPS replevin-related complaints, specific terms of individual DPAs were not always included in account records.

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<sup>20</sup> The sample was divided as follows: the Boroughs of Brooklyn at 52 percent, Queens at 21 percent, Bronx at 16 percent, Manhattan at 5 percent and Staten Island at 1 percent. Westchester County residential accounts comprised of 6 percent of the sample.

The Company's records showed that if a CSR had been advised that a medical condition existed at the residence, the customer was asked to provide documentation and the pending disconnection process was suspended as required by HEFPA.<sup>21</sup> The Con Edison database accounts reviewed, as well as the DPS replevin-related complaints, also indicate that the Company was in compliance with HEFPA's criteria regarding customers classified as elderly, blind or disabled.<sup>22</sup> In addition, the Company identifies these and certain other accounts as Concern Accounts to prevent disconnection of service during the Cold Weather Period.<sup>23</sup>

Voluntary Informal Conferences (VICs)

Plaintiffs in a replevin action must execute several procedures in order to file for an action of replevin in civil court. They must file a Summons and Complaint to commence a replevin action. In a replevin action, the utility also serves a Notice of Application to obtain an Order of Seizure when the utility cannot obtain access to its meters. In instances where a Notice of Application has been served, the customer may come to court to schedule a VIC with the utility. The meeting is not mandatory and no customer is obligated to participate in such a meeting. At the customer's request, the court clerk may either schedule a VIC or a hearing before the court.

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<sup>21</sup> 16 NYCRR 11.5(a)(2), (a)(3).

<sup>22</sup> 16 NYCRR 11.5.

<sup>23</sup> Concern Accounts are hardship conditions identified by the Company for the following situations at residential accounts: persons under 18 or older than 62 years of age; physical and mental afflictions, including infirmity; on life support system; serious illness; physical disability or blindness; or other factual circumstances that indicates a severe or hazardous situation.

As described in PULP's testimony in the rate case (Exhibit 1 to the petition), Con Edison used an extra-judicial practice in connection with replevin actions. Under this practice, Con Edison's Notice of Application advised a customer who is in arrears to appear in or adjacent to an official judicial courtroom, although no court-related proceeding regarding the replevin was scheduled to occur. The customer was also given the mistaken impression that he or she would be meeting with a judge and that the meeting would be conducted as a judicial proceeding and pursuant to a judicial process. In promoting this misconception, the Company scheduled some or all of these meetings through the court clerk and had made arrangements such that court papers relevant to the replevin, when they were produced, were not filed with the court.

The Joint Proposal adopted by the Commission in Case 16-E-0060 includes a provision requiring that the Company provide customers with a letter developed by PULP and the Company, with input from other parties, explaining how the customer can respond to replevin actions, and providing information as to customer rights and responsibilities. This letter is sent to customers approximately 7-10 days prior to the initiation of a replevin action by the Company.<sup>24</sup>

#### Findings of Staff Investigation

Customers are advised through the Notice of Application and the new Pre-Replevin Letter that they may elect to participate in a VIC or request an appearance before a judge. If a customer opts to participate in a VIC, the customer may

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<sup>24</sup> Case 16-E-0060, et al., supra, Joint Proposal (filed September 20, 2016) at 93.

inform the court clerk, who will schedule an appointment at a court facility.

VICs are routinely held in New York City Civil Courts and Westchester County Court. VICs are not conducted by a court employee; they are conducted by Company representatives. The following are four possible outcomes of a VIC: the customer defaults by not appearing; Con Edison and the customer negotiate a DPA; the defendant customer formally appears and files a written answer to the Summons and Complaint; or either the customer or the Company requests an adjournment.<sup>25</sup>

The Chief Clerk's Memorandum requires the Court Clerk to make an announcement at the beginning of the VIC to the defendants stating that:

1) representatives of the utility are present and it is the defendant's option to meet with the representatives to discuss the allegedly wrongfully held meter;

2) the VIC will be between the defendant and the utility representatives; and,

3) the VIC is not mandatory, and if the defendant wants to have a hearing by the court, he or she should inform the court clerk.

Staff observed five Con Edison VICs at the Kings Civil Court and ten VICs at the Queens Civil Court on February 7, 2017.<sup>26</sup>

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<sup>25</sup> The Chief Clerk's Memorandum provides that when a defendant does not choose to proceed with the VIC and requests a hearing, the designated clerk must accept the defendant's request and must generate a written answer and verification form (Form CIV-GP-58e) for the defendant to complete prior to scheduling a hearing date.

<sup>26</sup> NYLAG also provided similar observations of the VICs held in the Bronx Civil Court in its comments.

Kings Civil Court

In the five VICs Staff observed in Kings Civil Court, after the customers signed in to document arrival for the VIC, the customers' names were called by the Court Clerk and were escorted by an attorney representing the Company to a meeting location. In Kings Civil Court, the VICs were held on benches in a hallway outside of the courtroom. When the VICs began, a Company representative provided an oral statement that indicated that the Company representative was neither an attorney nor a judge; the meeting was voluntary; and the customer could request an appearance before a judge. A court representative was not present at any of the VICs to provide the announcement prescribed in the Chief Clerk's Memorandum.

The customer was asked to provide verbal consent to proceed with the VIC. The Company representative confirmed the customer's account information and address and provided an overview of the outstanding amount due and account payment history. None of the customers was advised of the availability of HEFPA rights and protections; nor were customers questioned by the Company attorney or representative on the status of any special service shut-off protections to which they might be entitled. The Company representative initiated the discussion on payment arrangements by inquiring what payment amount the customer believed he or she could afford. A formal financial assessment to determine the customer's ability to pay was not provided to the customer before entering into a DPA.

Three of the cases were adjourned at the VIC: in one case, to obtain additional information because the customer disputed responsibility for the arrearages accrued from a previous tenant; in another, because no actual meter reading was in the Company's records to verify the billing charges prior to continuing the replevin action; and in the third because the

customer offered to provide documentation of the customer's status with the New York City Human Resources Administration.

The remaining two VICs resulted in the customers entering into DPAs. Once an agreement was reached, the customer was provided an Action to Recover a Chattel Stipulation of Settlement Form, a court document which provides details on the terms and conditions of the settlement. The customer presented the form to the Company attorney who verified customer consent to the information presented in the document and that the meeting was voluntary. The customer proceeded to the courtroom with the Company attorney and appeared before a judge. The judge asked the customer if he or she understood the agreement and, if not, did the customer want to request an adjournment for a hearing at a later date. If the customer acknowledged acceptance of the agreement, both the customer and Company attorney signed the document before the judge. A receipt for any payment made was not routinely provided to each customer. Each VIC lasted approximately 5 to 10 minutes.

#### Queens Civil Court

Staff observed ten VICs in Queens Civil Court. The Queens Civil Court largely mirrored the Kings Civil Court replevin process. The VICs were held in a courtroom with two Company representatives and a Company attorney. In some instances, more than one VIC was conducted simultaneously in the same courtroom. While a bailiff was present, he did not participate; a court clerk did not make an appearance. As with the Kings Civil Court, customers were not advised of their HEFPA protections by the Company representative or attorney, and the required announcement by the court clerk was not provided.

Four of the VICs were adjourned for various reasons, including the following: to allow for the conclusion of a Company shared meter investigation; at the customer's request,

for additional time to arrange to make a down payment; to resolve pending landlord-tenant issues; and for the Company to conduct a cross meter investigation.<sup>27</sup> Another of the replevin actions was dismissed based on the documentation provided by the customer that verified the property was not in the customer's name.

Another customer requested the opportunity to speak with a judge and was referred by the Company representative to the Company attorney to discuss his options prior to making arrangements for a Court hearing. Another customer sought a hearing before a judge to dispute the charges. One customer had returned to the court following an adjournment of a previous VIC to make a scheduled down payment. Another customer, with commercial and residential accounts, entered into DPAs with the Company. A representative for a commercial customer negotiated a DPA after the Company waived several fees to reduce the arrearage amount. No financial forms or other documentation of the customer's ability to pay were used to determine the DPA amounts.

#### Electronic Deferred Payment Agreements (e-DPAs)

In 2013, the Commission authorized National Fuel Gas Distribution Corporation (National Fuel) to institute a pilot program for electronic DPAs (e-DPAs).<sup>28</sup> The pilot showed success and in July 2014, the Commission made National Fuel's e-DPA

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<sup>27</sup> A cross meter condition exists when the meter associated with a customer's account is actually measuring service consumed at another premises. This is distinct from a shared meter condition, which exists when a portion of service measured through a customer's meter is diverted for consumption in another premises.

<sup>28</sup> Case 13-G-0016, National Fuel - Electronic Deferred Payment Agreements, Order Approving Tariff Filing with Modifications (issued April 18, 2013).

process permanent and encouraged other utilities to consider petitioning for approval to use e-DPAs.<sup>29</sup>

National Fuel's program allows a customer to negotiate a DPA, based on a financial assessment, through a telephone call with a CSR. After the terms of the DPA are established, the CSR creates an electronic version of the DPA that is then entered into a secure portal, which can be accessed by the customer online. The customer electronically signs the DPA and returns it to the Company. National Fuel mails a printed copy of the DPA to the customer within three business days.

In its progress reports filed with the Commission, National Fuel indicated that the e-DPA process has met customer demand for a more convenient and secure method for entering into DPAs. National Fuel also stated that a significant majority of customers have elected to use the e-DPA process and that those customers have also adhered to their payment agreements at a higher rate compared to customers with traditional DPAs. According to the most recent report filed by National Fuel in April 2016, 65 percent of its DPAs have been negotiated through the e-DPA process since 2013.

#### DISCUSSION AND CONCLUSION

Replevin is a civil remedy to which Con Edison is entitled. Civil cases are resolved in the courthouse, including attempts to settle such cases. Therefore, the requests that the Commission oppose issuances of pre-judgment seizure orders or that the Commission require that civil court proceedings not occur in or near civil courts is neither within our purview nor appropriate.

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<sup>29</sup> Case 13-G-0016, supra, Order Approving Electronic Deferred Payments on a Permanent Basis (issued and effective July 28, 2014).

The recently adopted Pre-Replevin Letter provides a clear, plain language presentation to help customers better understand the replevin process, prior to receiving the formal Notice of Application that commences the replevin process. However, based on Staff's observations and the documents collected, the Commission believes that greater transparency to customers after the replevin process has begun is needed. Therefore, the Company shall undertake further modifications to its customer service procedures, its practices associated with DPAs, and the VIC process.

Customer Service Procedures

As Staff observed in its review of Con Edison's replevin accounts, CSRs negotiate DPAs with customers that are mailed for customer signature and return. However, the terms of the DPAs are not routinely captured nor retained in the CSS. Neither is it clear from customer records the date on which the DPA was mailed, other than a notation of the postage amount. Therefore, the Company shall review the information that CSRs input regarding the dates and terms of DPAs, and file a report within 60 days on the feasibility of including in the CSS, at a minimum: the date the DPS was offered, the type and terms of the offer, the date and terms of each negotiated DPA, the date the DPA is mailed, and documentation of returned DPAs with customer signatures.

Because of National Fuel's experience, we know that e-DPAs are technically feasible and legally valid. National Fuel's experience has also shown a higher rate of adherence to the DPA's commitments with e-DPAs than with mailed hard copy DPAs. They are convenient for customers, and also meet HEFPA's requirement that DPAs be signed.

Therefore, Con Edison shall propose its own e-DPA program for Commission approval within six months of this Order.

The implementation of an e-DPA process will enable Con Edison to achieve greater success in executing written DPAs with its customers before reaching the point where replevin action is necessary.

Modifications to the Voluntary Informal Conference Process

Additional elements shall be incorporated into Con Edison's VIC process to better ensure that customers fully understand their rights to have a hearing before the court and to be afforded a written DPA with, if necessary, a formal financial assessment.

Further, consistent with the City's Court Chief Clerk's Memorandum, the Company shall take steps to abide by the Memorandum's procedures by asking for a court representative to be present at the onset of the VIC so that a court representative, not Con Edison, informs the customer that the VIC is not mandatory and that the customer may request a hearing before the court.<sup>30</sup> Further, to provide an environment for the customer to discuss confidential account information, the Company shall seek locations at the court facilities that provide customer privacy during the VICs (i.e. hallway and other public spaces should be avoided).

Based on Staff and NYLAG observations, customers are not advised of their rights and protections under HEFPA, including the availability of a written DPA and a financial assessment. Therefore, Company representatives shall provide an overview of HEFPA through an oral statement and a related brochure at the beginning of each VIC.<sup>31</sup> Additionally, prior to entering into a DPA, Company representatives shall routinely

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<sup>30</sup> Con Edison cannot compel a court representative to appear; however, it can make such a request.

<sup>31</sup> The Annual Notification of Rights that the Company routinely provides to residential customers would serve this purpose.

conduct a financial assessment with the customer, using the Company's financial statement form, to determine appropriate payment arrangements. Completed DPAs can be submitted to the court with the Action to Recover a Chattel Stipulation of Settlement Form. If such a settlement has been reached, the Company shall in all circumstances provide the customer with a copy of the written agreement and receipts for payments.

To ensure the materials comply with this Order, Con Edison is directed to submit to the Secretary revised Voluntary Informal Conference procedures, including the VIC-related documents required by this Order and Company representative training materials, within 60 days of the issuance of this Order. Con Edison shall also file quarterly reports on customer accounts involved in the replevin process until directed by the Secretary that such reporting may end. Such reports shall include, at a minimum: the number of active replevin cases; the total amount of arrearages; the number of VICs conducted, by location; the number of accounts and total amount of arrearages settled by DPA or other settlement terms; and the number of customers who elected to appear before a judge.

The Commission orders:

1. Consolidated Edison Company of New York, Inc. shall review the information that Company customer service representatives input regarding DPAs, and file a report within 60 days on the feasibility of including, at a minimum: the date, type and terms of the offers; the date and terms of negotiated DPAs; the date DPAs were mailed; and, documentation of returned DPAs with customer signatures in its customer service system.

2. Consolidated Edison Company of New York, Inc. shall propose an electronic deferred payment agreement program for Commission approval within six months of this Order consistent with the body of this Order.

3. Consolidated Edison Company of New York, Inc. shall file revised Voluntary Informal Conference procedures as described in the body of this Order within 60 days of the effective date of this Order.

4. Con Edison shall file quarterly reports on customer accounts involved in the replevin process as described in the body of this order until the Secretary approves ending such reporting.

5. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least one day prior to the affected deadline.

6. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS  
Secretary

APPENDIX A

CIVIL COURT OF THE CITY OF NEW YORK

CHIEF CLERK'S MEMORANDUM  
Subject: Order of Seizure Calendar  
(Replevin Calendar)

Class: CCM -117-A  
Category: GP-60  
Eff. Date: August 15, 2016

=====  
BACKGROUND

CCM- 117 clarified Directive No. 288, with regard to procedures for the Order of Seizure calendar, where the alleged wrongfully held chattel is a utility meter. Both Directive No. 288 and CCM-117 were issued prior to the amendment of NYCCA § 400. Current statute requires the initial filing of a Summons and Complaint to commence an action; therefore, CCM-117 is rescinded.

For this reason, it is necessary to amend the procedures previously established with regard to the filing of an action for Replevin. The amended procedure is as follows:

PROCEDURE

1. Utility companies and other alleged owners of utility meters must file a Summons and Complaint in order to commence a replevin action in NYC Civil Court.
2. Following the guidance of the Public Service Law, and our ongoing adherence to the "Assurance of Discontinuance Pursuant to Executive Law Section 63, Subdivision 15," issued by the NYS Attorney General on February 24, 1983, as supplemented by letter from the Attorney General to Con Edison dated May 26, 2015, the plaintiff may serve a Notice of Application for an order of seizure when it cannot obtain access to customers' meters. In instances where a Notice of Application has been served, the defendant may come to court to schedule a voluntary meeting with the plaintiff utility company. This voluntary meeting is described herein as a "Voluntary Informal Conference" (VIC). This meeting is not mandatory, and no defendant is obligated to participate in such meeting.
3. If a defendant has been served a Notice of Application by the plaintiff/alleged meter owner and based on the information provided in the Notice of Application, wishes to schedule a VIC with plaintiff/alleged owner, the defendant can request that the clerk schedule the VIC. When a defendant appears at court after service of a Notice of Application, and requests that the clerk schedule a VIC, the clerk must:
  - schedule a date for the VIC to Part 38-VIC, selecting "preliminary conference" as the purpose in the UCMS-LC database.
  - generate the CIV-GP-75 (Scheduled Voluntary Informal Conference Regarding an Order of Seizure)
  - give the defendant a copy of the CIV-GP-75 for his/her information.

4. If a defendant has been served a Notice of Application, and based on the information provided in the Notice of Application, informs the clerk that they do not wish to participate in a VIC, and requests a hearing by the Court, the designated clerk must accept the defendant's answer and:
  - generate the CIV-GP-58e (SRL written answer and verification) for defendant to complete
  - schedule the matter for hearing to **Part 11R** in the database
  - inform defendant of the hearing date, and give the defendant a copy of the CIV-GP-58e for his/her information.
5. The clerk shall notify the plaintiff of the date and time of the VIC by giving a copy of the CIV- GP-75, or notify the plaintiff of the hearing by giving a copy of the CIV-GP-58e to the plaintiff in a manner arranged for locally in each county.
6. A clerk will be assigned to the Part designated for each VIC calendar, and will:
  - Make an announcement prior to the start of the VIC calendar informing defendants that:
    - representatives of the utility company are present and it is the defendant's option to meet with the representatives to discuss the alleged wrongfully held meter
    - the VIC will be between the defendant and the utility company representatives
    - the voluntary informal conference is not mandatory, and that if the defendant wants to have a hearing by the Court, he/she should inform the clerk.
  - Where a defendant appears for a scheduled VIC and requests a hearing by the Court, the defendant must be allowed to file an answer. The clerk must direct the defendant to the General Clerk's Office where he/she may submit an answer. The service window clerk will provide the defendant with a CIV-GP-58e, take his/her answer, and a hearing is to be scheduled as expeditiously as possible to the Part 11R calendar.
  - The clerk shall annotate the VIC calendar with the appropriate dispositions. Where a defendant does not appear for a scheduled VIC, the appropriate disposition is "Removed from Calendar."

7/20/16

Date

Carol Alt

Carol Alt  
Chief Clerk

## APPENDIX B

### FORM OF NEW YORK CITY PRE-REPLEVIN LETTER

[CON ED LOGO]

Date:

Dear Customer:

Our records indicate that you have a past due amount of (\$) for utility service under account number XXXXXXXXXXXXXXXX at (SERVICE ADDRESS). Since payment was not made and we could not access the meter in order to terminate service, we have the right to begin legal action to recover our meter.

#### **We have not yet brought legal action against you.**

You can avoid possible legal action and additional charges on your account by making prompt payment of the total amount due. To pay by phone, please call 1-888-925-5016. Please have your account number along with your banking information available at the time of your call. To pay by mail, please write your account number, shown above, on your check or money order and mail your payment in the enclosed return envelope. Please ensure that our address appears properly in the envelope window. If you cannot pay the total amount due on your account, depending on your circumstances, we may be able to arrange a deferred payment agreement.

If you do not contact us promptly to either pay the total amount due on your account, or if a deferred payment agreement cannot be arranged, we have the right to begin legal action to recover our meter by applying to the Court for an order of seizure. Recovering our meter through an Order of Seizure will result in termination of [electric or gas] service.

If legal action is taken against you, you can anticipate the following:

- (1) You will be served a "Notice of Application" and "Attorney Affirmation" which contains supporting documentation about the money you owe to the Company, and informing you of the legal action against you in an attempt to recover our utility meter because you have failed to pay the outstanding balance listed above on your account.
- (2) You will have fifteen (15) days from the date the "Notice of Application" and "Attorney Affirmation" are mailed to you to appear at the designated Court to respond.
- (3) When you appear at the designated Court, you will have two options:
  - a. You must either inform the clerk of the Court that you request a voluntary informal conference ("VIC") be scheduled by the Court; or
  - b. You must inform the clerk of the Court that you do not wish to participate in a VIC, and that you request that a hearing with a Judge be scheduled by the Court instead.

#### **NOTE ABOUT VOLUNTARY INFORMAL CONFERENCES**

Voluntary informal conferences ("VIC") are optional. Selecting to have a VIC means that the Court clerk will schedule a date and time for you to discuss your account with a representative from Con Edison at the Courthouse. However, a VIC can only be scheduled by the Court clerk *if requested by you*. At the VIC, it may be possible for the Con Edison representative to establish a new deferred payment agreement even if you defaulted on a payment agreement previously. Our records indicate that previously you defaulted on a Payment Agreement on (MMDDYY).

In preparing for a voluntary informal conference with the Company, or alternatively, for a hearing before a Judge, please bring proof of any medical condition necessitating utility service for you or a member of your household, or documentation showing your status, or a family member's status, as elderly, blind, or having a disability. You may also choose to

bring proof of unemployment, or financial hardship to support your request for a reduced deferred payment agreement.

(4) If you do not respond to the Notice of Application within fifteen days from the date it was mailed to you, we may present an order of seizure for a Judge's signature. If an order of seizure is signed, the Court will likely authorize a City Marshal to gain access to the premises to recover our meter, and a Court filing fee, and a Marshal fee, will both likely be added to your account. As stated above, we have not yet brought legal action against you. **You can prevent legal action from occurring by contacting us immediately** to arrange payment of the balance on your account, or to request a deferred payment agreement.

**Keep this letter as a guide in the event that we decide to take legal action against you.**